Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–277–12 OF 2015(B), 05–281–12 OF 2015(B), 05–278–12 OF 2015(B) AND 05–280–12 OF 2015(B)

ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), SURIYADI, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ

16 MARCH 2017

Criminal Procedure — Defence — Alibi — Whether alibi defence unproven — Whether testimonies of all four accused undermined credibility of first accused's alibi defence — Whether witness whom first accused met on night of murders testified they met well past time stated in murder charges — Whether first accused unable to prove where he was during time stated in charges — Whether prosecution's evidence of motive for murders of no probative value — Whether totality of circumstantial evidence overwhelmingly proved first, second and fourth accused committed murders pursuant to pre-arranged plan

Evidence — Expert evidence — Chemist's evidence — Chemist testified DNA analysis of blood taken from cricket bat, walls of building and zinc sheets matched DNA of three victims of murders — Whether chemist's evidence and his report inadmissible as hearsay as some of DNA tests done by his assistants who were not called to testify — Whether prosecution not required to call every laboratory officer assigned and supervised by chemist to carry out tests upon which chemist's report was based — Whether defence did not challenge reliability of any of tests done by chemist and his assistants nor produced own expert evidence in rebuttal

Evidence — Impeachment — Credibility of witness — Accused applied to impeach credibility of police witness under s 155(c) of the Evidence Act 1950 ('the EA') on ground his evidence in court contradicted his previous police reports — Testimony of witness concerned 'discovery information' given by accused persons under s 27 of the EA and evidence of their conduct (in pointing out location of incriminating items) under s 8 of the EA — Whether use of word 'statement' in s 155(c) meant both first information reports under s 107(1) of the Criminal Procedure Code and other police reports made after investigations commenced could be used to impeach witness under s 155(c) read together with s 145(1) of the EA — Whether discrepancies between police officer's court testimony and his previous police reports minor and not material enough to warrant impeachment of credibility

Evidence — Information leading to fact discovered — Evidence Act 1950 s 27 — Police officer testified information given by two accused persons led to discovery of items connected with murders — Whether Court of Appeal wrongly rejected s 27 evidence on ground information given was based on joint statement of more than one accused person — Whether s 27 evidence admissible as accused persons gave information individually although they were questioned jointly — Whether evidence of conduct of accused persons pointing out to police places where incriminating items were found relevant and admissible under s 8 of the Evidence Act 1950

Each of the four appellants herein was charged in the High Court with the murder of four persons at a farm belonging to one of the appellants, Pathmanabhan a/l Nalliannen ('Pathma'), a lawyer. The three other appellants, Thillaiyallagan a/l Thanasagaran ('Thillai'), Matan a/l Ravichandran ('Matan') and Kathavarayan a/l Rajodorai ('Kathavarayan') were Pathma's employees on the farm. Each appellant was charged with committing, in furtherance of their common intention, the murders of Pathma's client and business partner ('Sosilawati'), her driver ('Kamal'), a banker ('Hisham') and another lawyer ('Kamil') (collectively referred to as 'Sosilawati and the three others') between 8.30–9.45pm on 30 August 2010. After a full trial, the High Court convicted all the appellants and sentenced them to death, ruling that they had failed to cast a reasonable doubt on the prosecution's case. Their appeals to the Court of Appeal ('the COA') against conviction and sentence failed. The appellants were found guilty entirely on circumstantial evidence as none of victims' bodies was ever found; neither did any witness testify to having seen the dead bodies of Sosilawati and the three others or of having seen them being inflicted with injuries that caused their deaths. Through direct evidence from family members and friends of the victims and a maid ('SP33') who worked at the farm, coupled with mobile telephone call detail records and forensic and DNA evidence, the prosecution proved that Sosilawati and the three others were present at the farm on the day and time in question. SP33 testified that a day before the day in question she saw logs being unloaded from a lorry at the farm and preparations being made for the arrival of guests; that on the night in question she had heard screams and later saw a huge fire at the rear portion of the farm grounds. Upon their arrest, Thillai and Kathavarayan led police to the discovery of the cars Sosilawati and the three others had used (which were separately abandoned at two different locations), various personal effects of Kamal, Hisham and Kamil which had been discarded in nearby rivers as well as burnt logs and burnt zinc sheets from places where they had been thrown away. From the farm premises, police recovered a blood-stained cricket bat and took swabs from blood-stained walls. A burn site on the ground at the rear portion of the farm when dug revealed charred fragments of bone, believed to be human, but no conclusive DNA tests on them could be performed because of their condition. DNA analysis of the blood found on the cricket bat and the walls, however, showed that they belonged to Hisham while the blood stains on

the zinc sheets belonged to Kamal and Kamil. Sosilawati's DNA was never found on any item, yet the COA held that in all probability, based on inferences drawn from the facts and circumstances of the case, she, too, must have been killed by the appellants. The courts below rejected Pathma's sole, and unproven, defence of alibi because the testimonies of his co-accused in respect of that defence conflicted and also because the person ('SP61') whom Pathma said he went to meet at a hotel during the time stated in the charges testified that he only met Pathma after 10pm on the day in question. At the trial, the appellants sought to impeach the credibility of SP32, the police officer who testified that information given by Thillai and Kathavarayan and another person led him and his team to various spots inside and outside the farm where numerous incriminating items were discovered. The impeachment move was based on alleged material contradictions between SP32's testimony in court and what he had stated in several police reports. Holding that there were no such material contradictions, the trial court dismissed the impeachment attempt. The COA, however, held that there were material contradictions and that 'discovery information' under s 27 of the Evidence Act 1950 ('the EA') was wrongly admitted because the information given by Thillai, Kathavarayan and another person was given to police jointly and not individually. Nevertheless, the COA held that evidence of the accused persons pointing to where the incriminating items were found was admissible under s 8 of the EA. In the instant appeal, the appellants argued that SP32's evidence should have been wholly rejected and that the dismissal of their impeachment application was wrong. The appellants also argued that the DNA evidence in this case should not have been admitted because it was hearsay as the chemist ('SP86') who testified did not personally perform the entire DNA analysis but had also relied upon other tests done by his assistants, none of whom was called to testify at the trial.

Held, allowing Matan's appeal, setting aside his conviction and sentence and acquitting and discharging him of the charges; dismissing the appeals of the other three appellants and affirming their convictions and sentences:

(1) There was overwhelming evidence before the court to show that Sosilawati and the three others were murdered at the farm within the time and on the date stated in the charges and that their murders were committed by the first, second and fourth accused persons acting with common intention pursuant to a pre-arranged plan. The totality of the evidence was that the bodies of Sosilawati and the three others were completely incinerated with the use of the logs and zinc sheets in order to disassociate them with the farm, and by extension, with the first, second and fourth accused persons. On the evidence, the prosecution had succeeded in proving its case beyond reasonable doubt as against the first, second and fourth accused persons on all the four charges (see paras 247–248(d), (g), (m)(i) & 251).

(2) There was insufficient evidence to implicate the third accused (Matan) in the murder of Sosilawati and the three others as charged. The third accused was just a farm worker. The evidence connecting him to the incident were: (a) he was seen by SP33 unloading logs at the farm a day before the day in question; and (b) he was seen by SP59 at the farm at 10pm on the day in question. It was unsafe to rely on the evidence of SP59 who was rightly declared hostile by the trial judge. Apart from that, there was no evidence of conduct under s 8 of the EA and no evidence to show that he was involved in the discovery of the items under s 27 of the EA. As such, the trial judge erred in calling upon the third accused to enter upon his defence at the close of the prosecution's case (see para 252).

(3) At the end of the prosecution's case, the combined weight of the evidence led to only one conclusion — that Sosilawati and the three others must have met their untimely ends at the farm at the time stated in the charges at the hands of the first, second and fourth accused persons. The defence's evidence failed to raise any reasonable doubt on the prosecution's case. The first accused's defence was a mere denial and one of alibi. His alibi defence had no merit. There was no reason to disagree with the factual findings made by the courts below on the defence of alibi. The second accused merely said nothing happened at the farm on the day in question while the fourth accused in his defence merely testified that he saw Sosilawati and the three others being beaten up but completely denied his involvement (see paras 68–69 & 249–250).

(4) The Court of Appeal was wrong to hold that there were material discrepancies between SP32's evidence in court and his police reports. On the facts, there were no material discrepancies and, therefore, no basis to impeach SP32's credibility. There was no reason to disagree with the trial court's finding that SP32 was a credible witness. Hence, his evidence pertaining to the discovery information under s 27 of the EA and evidence of conduct under s 8 of the same Act were credible and reliable (see paras 96 & 101).

(5) There was no evidence of a joint statement having been made by the second and fourth accused persons. The trial judge found that the information, which led to the discovery, was given individually although the accused persons were questioned jointly. The alleged 'joint statement' issue had to be rejected. As the second and fourth accused had given information separately to SP32 and had led police to areas near the farm where items connected to the murder were discovered, the statement which led to the discovery was accurate. Accordingly, contrary to the finding of the Court of Appeal, the s 27 evidence was admissible (see paras 117–118 & 120).

(6) There was no basis to say the findings and testimony of SP86, and his report ('P600'), should not have been admitted on the ground of being

hearsay evidence. P600 was a scientific report by SP86, an unchallenged expert, derived from his examination, analysis and interpretation of the test results and data secured by his officers directly under his supervision. There was no necessity for the prosecution to have called each and every laboratory officer assigned and supervised by SP86 to carry out the required tests upon which P600 was premised. The crucial part was the examination, analysis and interpretation of those test results and data carried out by SP86 in producing P600. No challenge was made on the method adopted by SP86. At the trial, there was no allegation of unreliability of any of the test results and data secured by the laboratory officers. No rebuttal expert was called by the appellants to challenge the test results and data interpreted by SP86 (see paras 145–146).

(7) The evidence of motive (for the murders) as adduced by the prosecution was far from being satisfactory and far too equivocal to be of any value (see para 166).

[Bahasa Malaysia summary

Setiap daripada empat perayu telah dituduh di Mahkamah Tinggi kerana membunuh empat orang di ladang milik salah seorang daripada perayu tersebut, Pathmanabhan a/l Nalliannen ('Pathma'), seorang peguam. Tiga perayu yang lain, Thillaiyallagan a/l Thanasagaran ('Thillai'), Matan a/l Ravichandran ('Matan') dan Kathavarayan a/l Rajodorai ('Kathavarayan') merupakan pekerja Pathma di ladang tersebut. Setiap perayu telah dituduh melakukan, dalam melaksanakan niat bersama mereka, pembunuhan anak guam dan rakan kongsi perniagaan Pathma ('Sosilawati'), pemandunya ('Kamal'), pegawai bank ('Hisham') dan seorang peguam lagi ('Kamil') ('dirujuk secara kolektif sebagai 'Sosilawati dan tiga yang lain') antara pukul 8.30–9.45 malam pada 30 Ogos 2010. Selepas perbicaraan penuh, Mahkamah Tinggi telah mensabitkan semua perayu dan menjatuhkan hukuman mati ke atas mereka, dengan memutuskan bahawa mereka telah gagal untuk menimbulkan keraguan munasabah ke atas kes pendakwaan. Rayuan-rayuan mereka kepada Mahkamah Rayuan ('MR') terhadap sabitan dan hukuman telah gagal. Perayu-perayu didapati bersalah secara keseluruhan atas keterangan mengikut keadaan kerana tiada mayat mangsa telah ditemui; mahupun mana-mana saksi telah memberi keterangan telah melihat mayat Sosilawati dan tiga yang lain atau telah melihat mereka dicederakan sehingga menyebabkan kematian mereka. Melalui keterangan secara langsung daripada ahli keluarga dan rakan mangsa dan seorang pembantu rumah ('SP33') yang bekerja di ladang tersebut, bersama rekod butiran panggilan telefon bimbit dan keterangan DNA dan forensik, pendakwaan telah membuktikan bahawa Sosilawati dan tiga yang lain berada di ladang tersebut pada hari dan masa yang dipersoalkan. SP33 telah memberi keterangan bahawa sehari sebelum hari yang dipersoalkan dia telah melihat kayu balak diturunkan daripada sebuah lori di ladang itu dan persediaan telah dibuat untuk menyambut tetamu;

bahawa pada malam yang dipersoalkan dia telah mendengar jeritan dan kemudian melihat api yang besar di bahagian tepi kawasan ladang itu. Setelah mereka ditangkap, Thillai dan Kathavarayan telah membawa polis untuk menjumpai kereta-kereta yang telah digunakan oleh Sosilawati dan tiga yang lain (yang telah ditinggalkan berasingan di dua lokasi berbeza), pelbagai barang peribadi Kamal, Hisham dan Kamil yang telah dibuang di sungai-sungai berdekatan dan juga kayu balak terbakar dan kepingan zink yang terbakar dari tempat-tempat di mana ia telah dibuang. Dari premis ladang itu, polis menemui kayu kriket yang mempunyai kesan darah dan mengambil calitan daripada dinding yang mempunyai kesan darah. Satu tapak membakar atas tanah di bahagian tepi ladang itu apabila digali dijumpai serpihan tulang hangus, dipercayai tulang manusia, tetapi tiada ujian DNA yang muktamad ke atasnya boleh dilakukan kerana keadaannya. Analisis DNA darah yang dijumpai pada kayu kriket dan dinding itu, walaubagaimanapun, menunjukkan bahawa ia adalah milik Hisham manakala kesan darah pada kepingan zink adalah milik Kamal dan Kamil. DNA Sosilawati tidak pernah dijumpai pada mana-mana barangan tersebut, namun MR telah memutusan bahawa dalam semua kebarangkalian, berdasarkan inferens yang dibuat daripada fakta dan keadaan kes, dia, juga, mungkin telah dibunuh oleh perayu-perayu. Mahkamah bawahan menolak satu-satunya pembelaan alibi Pathma yang tidak boleh dibuktikan kerana keterangan-keterangan tertuduh bersamanya berkaitan pembelaan tersebut adalah bertentangan dan juga kerana orang itu ('SP61') yang mana dikatakan oleh Pathma telah ditemuinya di sebuah hotel pada masa yang dinyatakan dalam pertuduhan-pertuduhan itu telah memberi keterangan bahawa dia hanya berjumpa dengan Pathma selepas 10 malam pada hari yang dipersoalkan. Pada perbicaraan itu, perayu-perayu memohon untuk mencabar kebolehpercayaan SP32, pegawai polis yang memberi keterangan bahawa maklumat yang diberikan oleh Thillai dan Kathavarayan dan seorang lain yang membawanya dan pasukannya ke pelbagai tempat di dalam dan di luar ladang tersebut di mana banyak barangan yang menuduh itu telah dijumpai. Langkah pencabaran adalah berdasarkan percanggahan material yang dikatakan antara keterangan SP32 di mahkamah dan apa yang telah dinyatakan olehnya dalam beberapa laporan polis. Dengan memutuskan bahawa tidak ada percanggahan material yang sedemikian, mahkamah perbicaraan telah menolak percubaan untuk mencabar itu. MR, bagaimanapun, telah memutuskan bahawa terdapat percanggahan material dan bahawa 'discovery information' di bawah s 27 Akta Keterangan 1950 ('Akta tersebut') telah diterima dengan salah kerana maklumat yang diberikan oleh Thillai, Kathavarayan dan seorang yang lain telah diberikan kepada polis secara bersama dan bukan secara individu. Walau apa pun, MR telah memutuskan bahawa keterangan orang-orang tertuduh menuding kepada di mana barangan yang menuduh itu dijumpai adalah boleh diterima di bawah s 8 Akta tersebut. Dalam rayuan ini, perayu-perayu berhujah bahawa keterangan SP32 patut ditolak secara keseluruhan dan bahawa penolakan permohonan pencabaran mereka adalah salah. Perayu-perayu juga berhujah

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bahawa keterangan DNA dalam kes ini tidak patut diterima kerana ia adalah dengar cakap disebabkan ahli kimia ('SP86') yang memberi keterangan tidak secara sendiri melaksanakan keseluruhan analisis DNA tetapi juga telah bergantung kepada ujian-ujian lain yng dilakukan oleh pembantu-pembantunya, yang mana tidak seorang pun dipanggil untuk memberi keterangan semasa perbicaraan itu.

Diputuskan, membenarkan rayuan Matan, mengetepikan sabitan dan hukuman dan melepas dan membebaskannya daripada pertuduhan-pertuduhan; menolak rayuan-rayuan ketiga-tiga perayu lain dan mengesahkan sabitan dan hukuman mereka:

(1) Terdapat banyak keterangan di hadapan mahkamah untuk menunjukkan bahawa Sosilawati dan tiga yang lain itu telah dibunuh di ladang tersebut dalam tempoh masa dan pada tarikh yang dinyatakan dalam pertuduhan-pertuduhan itu dan bahawa pembunuhan mereka telah dilakukan oleh orang-orang tertuduh pertama, kedua dan keempat yang bertindak dengan niat bersama berikutan satu rancangan yang telah diatur terlebih dahulu. Keseluruhan keterangan adalah bahawa mayat-mayat Sosilawati dan tiga yang lain itu telah terbakar sepenuhnya dengan menggunakan kayu balak dan kepingan zink untuk tidak mengaitkan mereka dengan ladang tersebut, dan melalui lanjutan, dengan orang-orang tertuduh pertama, kedua dan keempat. Berdasarkan keterangan, pendakwaan telah berjaya membuktikan kesnya melampai keraguan munasabah terhadap orang-orang tertuduh pertama, kedua dan keempat atas semua empat pertuduhan (lihat perenggan 247–248(d), (g), (m)(i) & 251).

(2) Terdapat keterangan yang tidak mencukupi untuk mengaitkan tertuduh ketiga (Matan) dalam pembunuhan Sosilawati dan tiga orang lain sepertimana dituduh. Tertuduh ketiga hanya pekerja ladang. Keterangan yang mengaitkannya dengan kejadian tersebut adalah: (a) dia dilihat oleh SP33 menurunkan kayu balak di ladang itu sehari sebelum hari yang dipersoalkan; dan (b) dia dilihat oleh SP59 di ladang itu pada pukul 10 malam pada hari yang dipersoalkan. Ia tidak selamat untuk bergantung kepada keterangan SP59 yang wajar diisytiharkan musuh oleh hakim perbicaraan. Selain daripada itu, tiada keterangan tentang perlakuan di bawah s 8 Akta tersebut dan tiadak keterangan untuk menunjukkan bahawa dia terlibat dalam penemuan barangan di bawah s 27 Akta tersebut. Oleh itu, hakim perbicaraan terkhilaf kerana memanggil tertuduh ketiga untuk memasuki pembelaannya di penutup kes pendakwaan (lihat perenggan 252).

(3) Di akhir kes pendakwaan, gabungan beban keterangan membawa kepada hanya satu kesimpulan — bahawa Sosilawati dan tiga yang lain telah menemui pengakhiran mereka yang tidak diduga di ladang tersebut

pada masa yang dinyatakan dalam pertuduhan-pertuduhan itu di tangan orang-orang tertuduh pertama, kedua dan keempat. Keterangan tertuduh pertama hanya penafian dan bukan alibi. Alibi pembelaannya tidak mempunyai merit. Tiada sebab untuk tidak bersetuju dengan penemuan faktual yang dibuat oleh mahkamah bawahan berhubung pembelaan alibi. Tertuduh kedua hanya menyatakan bahawa tiada apa yang berlaku di ladang tersebut pada hari yang dipersoalkan manakala tertuduh keempat dalam pembelaannya hanya memberi keterangan bahawa dia melihat Sosilawati dan tiga yang lain dipukul tetapi menafikan sepenuhnya yang dia terlibat (lihat perenggan 68–69 & 249–250).

(4) Mahkamah Rayuan adalah salah untuk memutusan bahawa terdapat percanggahan material antara keterangan SP32 di mahkamah dan laporan polis. Berdasarkan fakta itu, tidak terdapat percanggahan material dan, oleh demikian, tiada asas untuk mencabar kebolehpercayaan SP32. Tiada sebab untuk tidak bersetuju dengan penemuan mahkamah perbicaraan bahawa SP32 adalah saksi yang boleh dipercayai. Justeru, keterangannya berkaitaan penzahiran maklumat di bawah s 27 Akta tersebut dan keterangan tentang perlakuan di bawah s 8 Akta sama adalah berwibawa dan boleh dipercayai (lihat perenggan 96 & 101).

(5) Tidak terdapat keterangan berhubung kenyataan bersama yang telah dibuat oleh orang-orang tertuduh kedua dan keempat. Hakim perbicaraan mendapati bahawa maklumat itu, yang membawa kepada penzahiran itu, telah diberikan secara individu meskipun orang-orang tertuduh telah dipersoalkan secara bersama. Isu 'joint statement' yang dikatakan itu telah ditolak. Oleh kerana tertuduh kedua dan keempat telah memberikan maklumat secara berasingan kepada SP32 dan telah membawa polis ke kawasan berdekatan ladang itu di mana barangan yang berkait dengan pembunuhan itu ditemui, kenyataan yang membawa kepada penemuan itu adalah tepat. Sewajarnya, bercanggah dengan penemuan Mahkamah Rayuan, keterangan s 27 boleh diterima (lihat perenggan 117–118 & 120).

(6) Tiada asas untuk mengatakan penemuan dan keterangan SP86, dan laporannya ('P600'), tidak patut diterima atas alasan ia merupakan keterangan dengar cakap. P600 adalah laporan saintifik oleh SP86, pakar yang tidak dicabar, yang diperolehi daripada pemeriksaan, analisis dan pentafsirannya berhubung keputusan ujian dan data yang dijamin oleh pegawai-pegawainya secara langsung di bawah penyeliaannya. Tiada keperluan untuk pendakwaan memanggil setiap dan semua pegawai makmal yang diberi tugas dan diselia oleh SP86 untuk melakukan ujian-ujian yang dikehendaki di mana P600 telah diasaskan. Bahagian penting adalah pemeriksaan, analisis dan pentafsiran keputusan ujian

dan data tersebut yang dilakukan oleh SP86 dalam menghasikan P600. Tiada cabaran telah dibuat atas kaedah yang diguna pakai oleh SP86. Semasa perbicaraan, tiada pengataan tentang ketidakbolehpercayaan mana-mana keputusan ujian dan data yang dijamin oleh pegawai-pegawai makmal itu. Tiada pakar pematahan telah dipanggil oleh perayu-perayu untuk mencabar keputusan ujian dan data yang ditafsirkan oleh SP86 (lihat perenggan 145–146).

(7) Keterangan berhubung motif (untuk pembunuhan tersebut) sepertimana dikemukakan oleh pendakwaan jauh daripada memuaskan dan terlalu samar untuk mempunyai apa-apa nilai (lihat perenggan 166).]

Notes

For a case on credibility of witness, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2350.

For cases on alibi, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2060–2095.

For cases on chemist's evidence, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1921–1932.

For cases on Evidence Act 1950 s 27, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2415–2417.

Cases referred to

Abdul Samid bin Edward v PP [2015] 4 MLJ 58; [2015] 4 CLJ 149, CA (folld)

Ahmad Najib bin Aris v PP [2007] 2 MLJ 505; [2007] 2 CLJ 229, CA (refd)

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)

Atley v State of Uttar Pradesh AIR 1955 SC 807, SC (folld)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (folld)

Bhikari Behera v State of Orissa 1995 CriLJ 2998, HC (refd)

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)

Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (folld)

Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)

Govind Krishna Jadhav v State of Maharashtra (1980) 82 BOMLR 173, HC (refd)

Gunapathy Muniandy v Dr James Khoo [2001] SGHC 165, HC (refd)

Krishna Rao Gurumurthi & Anor v PP and another appeal [2007] MLJU 888; [2007] 4 CLJ 643, CA (folld)

Kwang Boon Keong Peter v PP [1998] 2 SLR 592, HC (refd)

Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)

Molu And Ors v State of Haryana AIR 1976 SC 2499, SC (folld)

Muthusamy v PP [1948] 1 MLJ 57 (folld)
Ong Joo Chin v Rex [1946] 1 MLJ 1 (refd)
Prakash Chand v State (Delhi Administration) 1979 AIR 400, SC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
R v Broughton [2010] EWCA Crim 549, CA (refd)
R v Doheny and Adams [1996] Lexis Citation 5150; [1996] EWCA Crim 728, CA (refd)
Rangi Lal And Ors v State of UP 1991 CriLJ 916, HC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (folld)

Legislation referred to

Criminal Procedure Code s 402A
Evidence Act [SG] ss 47, 48, 53, 62, 62(1)
Evidence Act 1950 ss 8, 8(1), 11, 27, 35, 45, 46, 51, 73, 145(1), 155, 155(c)
Penal Code ss 34, 107(1), 302

Manjeet Singh Dhillon (Manjeet Singh Dhillon) for the first appellant.
Hisham Teh Poh Teik (Gurbachan Singh with him) (Bachan Kartar) for the second appellant.
Amer Hamzah bin Arshad (Khaizan Sharizad bt Ab Razak) (Amerbon) for the third appellant.
T Vijayandran (T Vijay & Co) for the fourth appellant.
Saiful Edris bin Zainuddin (Idham bin Abdul Ghani, Hamdan bin Hamzah, Norinna Bahadun and Jasmee Hameeza bt Jaafar with him) (Public Prosecutor, Attorney General's Chambers) for the respondent.

Arifin Zakaria Chief Justice, Richard Malanjum CJ (Sabah and Sarawak), Suriyadi, Azahar Mohamed and Zaharah Ibrahim FCJJ (delivering judgment of the court):

INTRODUCTION

[1] These are appeals against the decision of the Court of Appeal dated 4 December 2015 which dismissed the appellants' appeals against the decision of the High Court.

[2] In the High Court, each of the appellants was charged with four charges under s 302 of the Penal Code read together with s 34 of the same Code for the murder of Kamaruddin bin Shamsuddin ('Kamal'), Noorhisham bin Mohammad ('Hisham'), Sosilawati bt Lawiya ('Sosilawati') and Ahmad Kamil bin Abdul Karim ('Kamil'), an offence which carries the mandatory death penalty. In this judgment, unless identified separately, the deceased persons will be collectively referred to as 'Sosilawati and the three others'. The appellants

were convicted as charged and sentenced to death. The four charges read as follows:

1st Charge

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Kamaruddin bin Shamsuddin (No K/P 660809-06-5241) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan yang dibaca bersama dengan s 34 Kanun yang sama.

2nd Charge

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Noorhisham bin Mohammad (No K/P 720913-01-5043) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

3rd Charge

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Sosilawati binti Lawiya (No K/P 630712-01-5240) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

4th Charge

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Ahmad Kamil bin Abdul Karim (No K/P 781023-05-5253) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

[3] For convenience, in this judgment the appellants will be referred to as they were in the High Court. Pathmanabhan a/l Nalliannen will be referred to as the first accused, Thilaiyallagan a/l Thanasagaran will be referred to as the second accused, Matan a/l Ravichandran will be referred to as the third accused and Kathavarayan a/l Rajodorai will be referred to as the fourth accused. Where reference is to a single accused person, he will be referred to as 'the accused' and where reference is to more than one accused person, they will be referred to as 'the accused persons'.

PROCEEDINGS IN THE HIGH COURT

Brief facts

[4] In the afternoon of 30 August 2010 (the day in question), Sosilawati left for Banting, Selangor. She told her daughter, Erni Dekriwati Yuliana bt Buhari ('SP15'), that she was going to Banting to meet her lawyer, the first accused. The purpose of the visit as told by Sosilawati to SP15 was to bring forward the payment of two cheques in the sum of RM3m and RM1m respectively issued by the first accused. SP15 said that Sosilawati needed the money to pay bonuses to her staff and to give her family some money for the upcoming Hari Raya Aidilfitri.

[5] Sosilawati left her office at Nouvelles Visages, No 59, Lorong Haji Hussein 1, Off Jalan Raja Bot, Kuala Lumpur with her driver, Kamal, in her BMW car bearing registration No WTL 11. She was accompanied by a banker, Hisham, and a lawyer, Kamil. Hisham and Kamil were travelling in another car, a BMW bearing registration No AAJ 5, which belonged to Kamil.

[6] Suzanna bt Radin Pangat ('SP8'), Hisham's wife, and Sabrina bt Adnan ('SP14'), Kamil's wife, confirmed that on the day in question their husbands accompanied Sosilawati to Banting.

[7] Throughout the journey to Banting, various telephone conversations took place between Sosilawati, Kamal, Hisham and Kamil with their respective family members and friends, alluding to the fact that they were going to Banting. Kamal's nephew, Khairul Izwan bin Ismail ('SP9') spoke to Kamal at about 5pm on the day in question of his intention to sleep over at the latter's house. In the course of the conversation, Kamal told SP9 that he was in Banting with Sosilawati.

[8] Lyly Zanariah bt Abdul Manaf (SP62), a bank officer at CIMB, Kampung Baru Branch, also testified that Hisham had informed her in the morning that he would be in Banting in the evening on the day in question to break fast with a lawyer.

[9] Zurayina bt Jemaat ('SP7'), a salesgirl at Fazz Enterprise Banting, mentioned of her encounter with Sosilawati and a person called 'Kamal' at her shop at about 5.20pm SP7 told the court that Sosilawati bought 'kerepek' and cakes worth RM200.

[10] At about 7pm on the day in question, Kamil called SP15. During the telephone conversation between Kamil and SP15, Kamil had said 'entah mak

engkau bawa pergi hutan mana ni pokok kelapa sawit ni ...'. Kamil also informed SP15 that Sosilawati was in another car in front of them.

[11] At about 8.30pm on the day in question, SP15 received an unusual call from Sosilawati. Sosilawati informed SP15 that Kamal had taken photographs of her in compromising positions via hidden cameras placed in her bathroom in her house. Sosilawati's friend, Habishah bt Bahari ('SP16') received a similar call. That was the final call SP15 and SP16 received from Sosilawati. Upon checking Sosilawati's bathroom, SP15 found nothing untoward.

[12] Hisham and Kamil similarly made calls to their respective wives informing them that they would not be returning home for the next three days as they would be in Genting Highlands. The reasons given were related to the problem faced by Sosilawati with her driver. After the calls, Sosilawati and the three others could no longer be contacted.

[13] On 31 August 2010, Sosilawati's ex-husband, Buhari bin Mohamed ('SP24') and SP15 went to Banting to look for Sosilawati. There was no trace of her. SP24 then called the first accused who denied having met Sosilawati on the day in question.

[14] Following reports lodged by the respective family members, the police mounted an investigation which focused on Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, a farm ('the farm') belonging to the first accused.

[15] Siti Hamidah Karnax ('SP33'), an Indonesian maid who worked on the farm, testified that at about 7pm on the day in question she saw one woman and three men at the farm and that she later heard a woman scream. She also saw a big fire that reached the height of the adjoining oil palm trees. She saw the first and the fourth accused having a conversation near the dog kennels. They were then seen by SP33 leaving in a hurry in the fourth accused's car. SP33 further told the court that she had seen logs being off-loaded from a lorry a day earlier by the third accused and other workers. She also saw preparations being made earlier on the fourth accused's instruction, indicating the arrival of guests at the farm.

[16] Apart from the evidence alluded to above, the prosecution also led evidence of the telecommunication records kept by the various service providers, namely, Digi, Maxis and Celcom, which charted the journey of Sosilawati and the three others until their final destination at the farm. These records included the records of the registered users of the mobile telephone numbers as well as call detail records ('CDR') and itemised bills. The CDRs and itemised bills captured the details of incoming and outgoing calls, and short messaging system messages ('SMS') as well as the time the calls and SMS

messages were made. Amongst the witnesses called from the telecommunication companies were: from Celcom, (i) Norazlina bt Ahmed ('SP40'), (ii) Abdul Latif bin Mohamed ('SP41'), (iii) Haisal bin Hambali ('SP44') and (iv) Mohd Razali bin Ismail ('SP102'); from Maxis, (i) Ahmad Safuan bin Shahrani ('SP46') and (ii) Prasath a/l Ramasamy (SP47); and from Digi, Chong Chee Wah ('SP64'). A B

[17] The information from the telecommunication records identifies the transmission towers servicing these calls. This indicates the locations of the persons communicating. The duration of the calls was also recorded. C

[18] Chief Inspector Govindan a/l Narayasamy ('SP32') testified that the information given by the second and fourth accused persons together with Suresh a/l Ulagathan ('SP29'), led SP32 and his team to various spots inside and outside of the farm where numerous incriminating items were discovered. D

[19] Defence counsel objected to the admission of evidence of the information that led to the discovery of these items as they contended that it was given under oppression. The trial judge then conducted a trial within a trial ('TWT') to determine whether there was any oppression on the second and fourth accused persons and SP29. At the TWT, nine witnesses testified on behalf of the second and fourth accused persons including the second and fourth accused persons, while the prosecution called ten rebuttal witnesses. At the end of the TWT, the trial judge ruled that there was no evidence of oppression and he accordingly admitted the information given by the second and fourth accused persons and SP29. E F

[20] Acting on the information given by the second and fourth accused persons and SP29, SP32 and a team of police officers were led to a black spot at the farm. On digging this black spot a number of bones were unearthed. The bones were cleansed and handed over to medical personnel for forensic examination. G

[21] From the farm, the police also seized a cricket bat which had traces of blood. The police also took cotton swabs of blood traces found on the walls of one of the buildings. H

[22] Acting on information given by the second and fourth accused persons and SP29, the police with the help of police divers also discovered a number of other items, which included watches and handphones, which were later identified by their respective family members as belonging to Kamil, Hisham and Kamal. I

[23] On the information of the second and fourth accused persons and

SP29, the police also discovered two vehicles used by Sosilawati and the three others to go to Banting. The vehicles were found at two different locations in Subang Jaya.

[24] Finally on the information given by the second and fourth accused persons and SP29, the police found burnt logs in a rubbish dump not far from the farm. The police also found burnt zinc sheets some of which bore traces of blood. All these items were seized and handed over to various agencies for forensic examinations.

Medical evidence

[25] A number of medical doctors were called by the prosecution. The three doctors who examined the bones discovered from the river and the farm were Nurliza bt Abdullah ('SP63'), Zaleha bt Abdul Manaf ('SP71') and Faridah bt Mohd Nor ('SP80'). SP71 and SP80 could not make positive findings on the bones as they were too charred and burnt indicating exposure to extreme heat. For the same reason no DNA extraction or analysis could be done by the chemist, Lim Kong Boon ('SP86'). SP63 however gave evidence that some of the bones discovered from the farm and river were human bones.

DNA evidence

[26] SP86 testified that he had analysed the blood samples from the cricket bat and the wall of a building in the farm. SP86 found that the cricket bat had the DNA of Hisham and that the DNA on swab 9 from the wall also matched that of the immediate family members of Hisham. The zinc sheets were also analysed, and the results revealed that three of the zinc sheets, exhs P80A, P78A and P75A, had the DNA of Kamal and Kamil.

Evidence of SP29 and SP59

[27] The prosecution called SP29 and SP59 who were arrested together with the second and the fourth accused persons. Both SP29 and SP59 were earlier charged in the Magistrates' Court at Teluk Datuk on 15 October 2010 for disposing of evidence related to the murder trial. SP29 was charged with disposing of the ashes of Sosilawati and the three others while SP59 was charged with helping to burn their bodies.

[28] Both SP29 and SP59 pleaded guilty to the charges and had admitted to the facts tendered by the prosecution which contained statements that Sosilawati and the three others were burnt to death at the farm and their ashes disposed of.

[29] However, before the learned trial judge, SP29 and SP59 withdrew their earlier statements and stated that nothing untoward happened at the farm on the day in question. They went on to allege that they were coerced into pleading guilty and admitting to the facts of the case in the magistrates' court on 15 October 2010.

[30] Following that, the prosecution then sought to impeach the credibility of SP29 and SP59. Two separate TWTs were conducted by the learned trial judge. At the end of the TWTs, the learned trial judge ruled that SP29's credibility was impeached and SP59 was declared a hostile witness, rendering the evidence of both SP29 and SP59 worthless.

[31] The prosecution, amid strong objections from the defence, then applied to adduce the records of proceedings in the magistrates' court under ss 11 and 73 of the Evidence Act 1950 ('the EA'). After hearing arguments, the learned trial judge invoked ss 11 and 35 of the EA and allowed the application by the prosecution. The record of proceedings containing the guilty pleas of SP29 and SP59 were then admitted and marked as exhs P711 and P712 respectively.

FINDING OF THE HIGH COURT AT THE CLOSE OF THE PROSECUTION CASE

[32] At the end of the prosecution case, upon a maximum evaluation, the learned trial judge held that the prosecution had succeeded in proving a prima facie case against all the accused persons on the four charges. Accordingly, they were called upon to enter on their defence.

THE DEFENCE CASE

[33] All the accused persons elected to give their evidence on oath.

The first accused

[34] In his defence, the first accused stated that in the evening of the day in question, he visited his mother at her house and he also went with an estate agent to view some land. At about 8.30pm, the fourth accused drove him to Subang Jaya to meet a friend.

[35] He admitted that the farm belonged to him. However, he stated that he did not go to the farm on the day in question let alone meet Sosilawati and the three others there.

[36] The first accused, however, confirmed that he was the lawyer for Sosilawati in a land transaction in Penang. Apart from that, he had an interest

in the purchase of the land. He admitted he was also the lawyer for another company belonging to one Rahman Palil for the same piece of land and also had an interest in that land transaction.

The second and third accused persons

[37] The second and the third accused persons stated that they worked at the farm and admitted being present at the farm on the day in question. They stated that although the first accused was the owner of the farm, their dealings were mostly with the fourth accused, who paid their salaries, and who directed and supervised their work at the farm.

[38] The second and the third accused persons testified that the first accused did not come to the farm on the day in question and that nothing untoward happened at the farm on that day. They further testified that both of them together with the fourth accused, SP29 and SP59 gathered at the farm around midnight on the day in question to hoist the Malaysian flag and to light a small fire to celebrate Merdeka Day. Thereafter, they ate and slept until the next morning.

[39] The second accused stated that in the morning of 31 August 2010, he went to his grandmother's house and returned only in the evening. The defence called the second accused's grandmother Angamah a/p Rengasamy (SD13) and she confirmed that the second accused did visit her in the morning of 31 August 2010 and stayed till evening.

[40] The third accused merely stated that on 31 August 2010, he carried out his routine work at the farm.

The fourth accused

[41] The fourth accused testified that he stayed at the farm which belonged to the first accused. He stated that his role was limited to the construction works at the farm and the supervision of workers involved in the construction works. He stated that the rest of the farmhands including the second and the third accused persons were under the direct supervision of the first accused. He further testified that the second accused was also the bodyguard of the first accused.

[42] Contrary to the evidence of the first, second and third accused persons, the fourth accused stated that the first accused was at the farm on the day in question and that Sosilawati and the three others came to the farm on that day

to meet the first accused. The fourth accused testified that there were about four or five other persons besides Sosilawati who came to the farm at the same time on the day in question.

[43] The fourth accused further stated that he heard a quarrel in one of the buildings at the farm, and when he went in he saw Sosilawati's driver being beaten. He also testified that he saw the lawyer (Kamil) being beaten and that he heard the first accused giving instructions to the second and third accused persons to kill the driver and the lawyer.

[44] The fourth accused also stated that he saw Sosilawati and the three others being bundled off to the neighbouring farm and the next morning he saw them being brought back to the farm. At the farm, he witnessed the three persons who accompanied Sosilawati being burnt with the logs at the location, which he marked on a sketch plan.

[45] The fourth accused testified that the first accused had cajoled him to accept what had happened and asked him and the second and third accused persons to remain silent on the matter. The first accused had also prepared them to face possible arrest and indicated that they could cooperate with the police as later on they could retract any statement to the police by claiming that the statement was given under force or duress.

Remaining defence witnesses

[46] Kandasamu a/l Nadeson ('SD15'), the father of SP59, testified that on the arrest of SP59 he had engaged the services of Avtaar Singh a/l Sukhdev Singh ('SD9') to defend SP59 in the event he was charged.

[47] SD15 stated that he was however summoned to the Kuala Lumpur police contingent headquarters where he was persuaded by the police to appoint a lawyer recommended by them if he wanted to see his son freed. He was pressured into signing the warrant to act authorising the lawyer as recommended by the police to represent SP59.

[48] SD15 further stated that he was later informed that a team of lawyers had been assigned to defend his son during the proceedings in the Magistrates' Court at Teluk Datuk. At this point, SD15 said that he had a change of heart and wanted to revert to SD9. SD15 spoke to SP59 to convince him to revert back to the earlier lawyer but SP59 refused.

[49] The evidence of SD9 echoed that of SD15, where SD9 testified as to how he was unceremoniously dumped in favour of another team of lawyers,

and that he only discovered this when he attended the Magistrates' Court at Teluk Datuk in the morning of the proceedings.

[50] ACP Abdul Aziz bin Zakaria (SD28) admitted that he had recommended his acquaintance, Roslie bin Sulle ('SD30'), to defend SP29 and SP59 when SD30 came to his office on an unrelated matter.

[51] SD30 confirmed that he acted for SP29 and SP59 with another lawyer by the name of Puravalen and that he did so with the explicit and written agreement of both SP29 and SP59 and their families.

[52] A number of police officers were called by the defence to show that the oral testimony of SP32 and his team in relation to the information leading to discovery was contrary to the entries in the lock up register, and that the movements in and out of the lock up showed that the accused persons were kept away for long periods of time.

[53] Pavithra a/p Rama Sundran ('SD26'), an occupant of the farm, confirmed that SP33 was also an occupant of the farm, working as a maid. SD26 testified that nothing unusual happened at the farm on the night of the day in question. She said she neither heard nor saw any fire outside the house where they stayed. She further testified that there was no unusual activity on 31 August 2010 at the farm.

[54] Sivabalan a/l Nagayah (SD20) was a government chemist entrusted with the task of analysing soil samples from the tyres of the vehicles handed to him by the police. He confirmed that he was not requested or directed to carry out comparison studies of the soil samples taken from the tyres of the car with the soil samples taken from the farm.

[55] Balasubramaniam a/l P Chinaswary ('SD12'), a person who carried out Hindu cremations, testified as to how a cremation was done and its aftermath. It was the evidence of SD12 that the logs discovered by the police were not suitable for open burning cremation and that it would be impossible for more than one body stacked on top of one another to be burnt effectively.

FINDING OF THE HIGH COURT AT THE CLOSE OF THE DEFENCE CASE

[56] At the close of the defence case, the learned trial judge found that all the accused persons failed to cast a reasonable doubt on the prosecution case. The circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. All the accused persons were found guilty of the offences as charged and sentenced to death.

PROCEEDINGS IN THE COURT OF APPEAL

[57] Aggrieved, all the accused persons appealed to the Court of Appeal. They failed in their appeals. Their convictions and sentences were affirmed by the Court of Appeal.

PROCEEDINGS IN THIS COURT

[58] Before us, several issues were raised by learned counsel for the accused persons contending that both the High Court and the Court of Appeal had erred in their findings. We will deal with these issues first before considering whether or not the convictions of the accused persons are safe.

ALIBI DEFENCE

[59] This issue is in respect of the first accused alone. It was raised at the prosecution stage. The mandatory notice pursuant to s 402A of the Criminal Procedure Code ('the CPC') was served.

[60] The time stipulated in the charges against the first accused was between 8.30pm–9.45pm on the day in question.

[61] It was the defence of the first accused that he was nowhere near the scene of the crime at the time as stated in the charges. As such it was impossible for him to have been involved in the murder at the farm. At the material time, he was on his way to meet a retired police officer, Mohamad Jamil bin Mohamad Hasan ('SP61'), at Dorsett Hotel, Subang Jaya.

[62] In his evidence, SP61 testified that the first accused called him around 1.30pm on the day in question, to invite him for breaking of fast since it was then the fasting month. But according to SP61 the first accused failed to turn up at the appointed time. Consequently SP61 called the first accused who told him that he would not be able to make it for the breaking of fast. However the first accused asked SP61 to wait for him because he 'got some uncompleted work to do'. No time was given to SP61 of when he would be arriving. The first accused only called back SP61 after 10pm that same evening. When SP61 arrived at the hotel, the first accused was already waiting for him. SP61 did not see who drove the first accused to the hotel. The first accused told SP61 that it was the first accused's brother who drove him there, but the brother had left him to meet some friends. According to SP61 their meeting lasted for about two hours.

[63] The first accused maintained that he was already in Banting town at 5pm on the day in question and he went to his mother's house around 5.30pm.

The first accused then met a friend by the name of Manickam to discuss some business matters. He later asked Ravi (the fourth accused) to pick him up around 8.20pm and drive him to Subang Jaya to meet up with SP61. He further testified that it took 1 1/2 hours to travel from the farm to Dorsett Hotel, Subang Jaya.

[64] Our courts in several cases have discussed the principles related to the defence of alibi (see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 and *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49.)

[65] In *Duis Akim & Ors* this court said this:

> [92] (i) 'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see: *Regina v Youssef* (1990) 50 A Crim R1 at pp 2–3);
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> (ii) the correct 'approach to be adopted in regard to an alibi defence, ... is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt' (see: *S v Leve (CA&R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa));
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> (iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true' (see: *R v Hlongwane* 1959 (3) SA 337);
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> (iv) '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false' (see: *S v Liebenberg* 2005(2) SACR 355 (SCA));
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> (v) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime' (see: *Mutachi Stephen v Uganda*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see: *R v Lizotte* 1950 CanLll 48 (SCC); [1951] SCR 115); and
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> (vi) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see: *R v Letourneau* [1994] BCJ No 265 (QL) (CA), 61).

[66] In the present case the learned trial judge dealt with the defence of alibi of the first accused in these words:

It is glaringly obvious that the defence of the accused was not untied especially between the first three accused and the fourth accused ...

In this case the first accused testified that at about 8.30pm on 30 August 2010 he was taken by the fourth accused to see a friend at Subang Jaya. This was flatly denied by the fourth accused who testified that he never left the farm the night of 30 August 2010 and therefore adverting the first accused was lying on this matter. The first accused together with the second and third accused contended that the fourth accused was not on the farm the night of 30 August 2010 and he did not meet Sosilawati and company on the farm that night or any time after.

The fourth accused again traversed this claim by admitting that Sosilawati did come to the farm on 30 August 2010 and did meet the first accused. Both the second and third accused were present.

The first accused together with second and third accused also testified that nothing untoward or unusual happened on the farm on the 30 August 2010 or 31 August 2010. This evidence was again repelled by the fourth accused ...

In the face of such diversity between the evidence of the accused the court could choose to disbelieve the evidence of all the accused and accept the version of the prosecution. The defence sought to explain this diversity in evidence to the fact there was a fall out between the first accused and the fourth accused when the 1st accused rejected a request of help from the fourth accused. This could be true but it still does not explain the diversity in evidence bearing in mind especially that some portion of the evidence of the fourth accused is consistent with the prosecution's evidence.

[67] The Court of Appeal agreed with the findings. It opined that the defence of alibi should be rejected for the following reasons:

[178] To establish alibi, the 1st appellant must disclose where he was at the time of the alleged offence and what he was doing (see *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166). The time preferred in the charge was between 8.30pm–9.45pm on 30 August 2010. The first appellant arrived at Dorsett Hotel, Subang to meet SP61 at about 10.15pm–10.20pm. We find that the evidence of SP61 is not evidence in support of alibi. The first appellant could be travelling at the time stated in the charge in which case the evidence of his brother who had purportedly driven him to Subang would be material but the brother was not called to testify.

[179] Further, the evidence of the first appellant in his defence contradicts the evidence given by SP61. According to SP61, the first appellant told him that the first was sent to Dorsett Hotel by his brother. In his defence, the first appellant stated that it was the fourth appellant who had driven him to Dorsett Hotel, which version was denied by the fourth appellant. In the circumstances we find that the first appellant's defence of alibi had failed to raise a reasonable doubt on the prosecution case.

[68] A defence of alibi is factual, premised on evidence adduced. In the present case the courts below had made their factual findings related to the

defence of alibi. We have examined the basis of those findings and we have no reason to disagree with them. It may be noted that the first accused missed his appointment with SP61 to break fast which was supposed to be in the early part of the evening on the day in question. He only arrived at the hotel past 10pm that evening. There was in fact no evidence adduced as to where the first accused was prior to his arrival at the hotel. Even the evidence on how he came to the hotel was subject to two conflicting versions. SP61 said that the first accused told him that it was his brother who dropped him at the hotel while the first accused claimed that it was the fourth accused who drove him to the hotel, which the fourth accused denied. SP33 testified that around 1am when she went to pick up the pail from the karaoke hut, she saw the fourth accused with three of his workers. Confronted with such evidence, it was not surprising that the courts below did not accept the defence of alibi of the first accused. As will be elaborated later in this judgment, the evidence related to the telephone calls and the SMS messages show that the first accused could still be in Banting just before 9pm on the day in question.

[69] Accordingly we find no merit in the alibi defence of the first accused.

CREDIBILITY OF SP32

Denial of the right to impeach SP32

[70] One of the grounds raised by the accused persons concerned the dismissal by the High Court of their application to impeach the credit of SP32, who was undoubtedly a key prosecution witness. As alluded to earlier, the prosecution had led through SP32's evidence pertaining to discovery information under s 27 and evidence of conduct under s 8 of the EA. Evidence relating to information leading to discovery, and evidence of conduct, constitute the main plank of the prosecution case against the accused persons, in particular the second, third and fourth accused persons. Issues arose in the trial on the credibility of SP32 over the material contradictions of his evidence in court and a series of former written statements in the form of police reports lodged by SP32 himself.

[71] In the course of the trial in the High Court, learned counsel for the first accused applied to impeach SP32 based on the alleged contradictions between his evidence in court and his own police reports, in particular Banting Report 7044/10 ('Banting report') lodged on 12 September 2010 and Tanjong Sepat Report 0947/10 ('Tanjong Sepat report') lodged on 13 September 2010. This impeachment application was dismissed by the learned trial judge for the following reasons:

(a) the police reports not being first information reports were inadmissible and could not be used to impeach a witness; and

(b) there were no material discrepancies between the police reports and the evidence of SP32 in court.

[72] The Court of Appeal disagreed with the learned trial judge. The Court of Appeal held that the learned trial judge erred in ruling that the police reports lodged by SP32 were inadmissible. More significantly, upon examining the appeal record, the Court of Appeal found that there were material discrepancies between the evidence of SP32 in court and his police reports. In its judgment, the Court of Appeal held that the finding of the learned trial judge that there were no material discrepancies was for that reason perverse. In spite of this finding, the Court of Appeal placed reliance on the evidence of SP32 pertaining to the conduct of the second, third and fourth accused persons under s 8 of the EA, which formed one of the foundations of the case for the prosecution against them. The Court of Appeal said this:

> [122] We nevertheless agree with the learned trial judge that the acts of the second to the fourth appellants in taking SP32 and pointing to the places where the items were recovered amount to conduct which is admissible under s 8 of the EA.
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> ...
>
> [123] ... We therefore accept the evidence of SP32 insofar as it relates to the fact that the second to the fourth appellants had displayed conduct consistent with their knowledge of the places where the items which were connected to the commission of the offence and which belonged to the victims were disposed off.

[73] Before us, learned counsel for the first accused submitted that having found that there were material discrepancies, the Court of Appeal should have gone on to hold that the denial to the first accused of the right to impeach SP32 was a denial of a fundamental right to due process of law. Given that there were material discrepancies, it was further submitted that the Court of Appeal erred in accepting the evidence of SP32 in relation to the evidence of conduct under s 8 of the EA. Learned counsel submitted that had the learned trial judge correctly accorded the first accused this right and thereafter rule that there were material discrepancies (as the Court of Appeal had found), the impeachment procedure would have been started and the first accused would then have an extensive right of cross-examination. He further argued that the impeachment procedure would have mandated the learned trial judge to ask SP32 for an explanation for all of the material discrepancies and, in the absence of any credible explanation, SP32 would have been impeached. According to learned counsel, SP32's credibility would have been demolished and without him, to borrow his words, 'the prosecution would not even have had the semblance of a case'.

[74] In similar vein, learned counsel for the second accused submitted that the learned trial judge had seriously erred in law and in fact in dismissing the

application to impeach SP32 with his own police reports. He submitted that the ruling had severely prejudiced the second accused. Hence, the s 27 discovery information would be rejected on the basis that SP32 had failed to pass the twin tests of 'reliability and accuracy' as enunciated by this court in *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal* [2007] MLJU 888; [2007] 4 CLJ 643.

[75] As observed by this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145, impeachment is generally to call into question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief. The purpose of the impeachment of the credit of a witness is to undermine his credibility by showing that his testimony in court should not be believed because he is of such a character and moral make-up that he is one who is incapable of speaking the whole truth under oath and should not be relied on (per Yong Pung How CJ in *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592).

[76] Two provisions of the EA are relevant, and they provide a good starting point in considering the submissions advanced by the accused persons. The first is s 155, which prescribes the three methods by which the credit of a witness may be impeached, namely:

(a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence; and

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

[77] The second provision is s 145(1) which provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[78] In the present case, a point to note is that the accused persons relied on s 155(c) to impeach the credit of SP32 by proving that SP32's former statements, that is to say, the police reports, are inconsistent with certain parts of his evidence in court that are liable to be contradicted.

[79] As such, the central question which we must first ask is, whether the former statement as envisaged in s 155(c) may be in the form of a police report of SP32, notwithstanding that such report is not a first information report. On this, as stated earlier, the learned trial judge did not allow the application to contradict SP32 based on his police reports on the ground that they were not first information reports. The Court of Appeal, however, took a contrary view.

[80] The phrase 'first information report' is commonly used in relation to information given under s 107(1) of the CPC relating to the commission of an offence for which a person is charged. The first information report is usually made very early after the occurrence of an offence and forms the basis of the case (see *Mallal's Criminal Procedure* (6th Ed), para 4152). A first information report serves as a complaint to the police to set the criminal law in motion, whereas the other reports, such as an arrest report, relate to steps taken by the police subsequently (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). What should be noted here is that the police reports made by SP32 were not first information reports made under s 107(1) of the CPC but were in point of fact made by SP32 relating to discovery information in the course of police investigation. These reports were made after police investigation had already commenced. In our judgment, for the purpose of s 155(c) of the EA, it makes no difference whether the police reports are first information reports made under s 107(1) of the CPC or otherwise. The issue must be approached on the basis of the language used in s 155(c). The term 'statement', which is very broadly drafted is not defined anywhere in the EA. In our judgment, the term 'statement' used in s 155(c) is comprehensive enough to include first information reports made under s 107(1) of the CPC and also police reports made after police investigation has already commenced. It would be unduly restrictive to confine the term exclusively to first information reports. We draw support for this view from the judgment in *Balachandran v Public Prosecutor* where this court, in discussing the distinction between first information reports and other police reports, said at pp 311–312 (MLJ); pp 95–96 (CLJ):

> The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve. While a first information report serves as a complaint to the police to set the criminal law in motion the other reports relate to steps taken by the police thereafter as, for example, an arrest report. Thus any change in the law relating to their admissibility cannot alter their character. The distinction between both types of reports still remains. It must be added that only the first information report is admissible under s 108A in addition to ss 145 and 157 of the Evidence Act 1950 while the other reports are admissible only under the latter provisions of law.

[81] In light of the foregoing discussion, we therefore prefer the view of the Court of Appeal that the police reports being the former statements made by SP32 could be used to impeach his credit under s 155(c) read together with s 145(1) of the EA.

[82] The proper method of impeaching the credit of a witness had been well set out in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57, which was approved by this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* and *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*. As the key to the determination of the issue centred on the proper method of impeaching the credit of SP32, it is apposite to set out in extenso the judgment of Taylor J in *Muthusamy v Public Prosecutor* as follows:

> The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable. Differences may be divided into four classes:
>
> (a) Minor differences, not amounting to discrepancies;
>
> (b) Apparent discrepancies;
>
> (c) Serious discrepancies;
>
> (d) Material contradictions.
>
> Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English. If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the magistrate should say at once:
>
> The difference is not such as to affect his credit' and hand the statement back.
>
> If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.
>
> If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of

his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

[83] One of the important propositions that may be distilled from the above passage is that there must be some material discrepancies before a witness can be subjected to impeachment proceedings.

[84] With this in mind, we must now turn to address the crucial issue whether there exist serious or material discrepancies between the police reports and the evidence of SP32 in court before he could be subjected to impeachment proceedings. As discussed earlier on, the courts below came to different findings.

[85] In this regard, learned counsel for the second accused in his oral and written submissions took us through the evidence of SP32 led at the trial. First, he brought to our attention the relevant parts of the evidence of SP32 as can be seen at pp 7025–7026 of AR Vol 2aj when SP32 was being cross-examined by learned counsel for the first accused ('the first complaint'). The subject matter of the cross-examination was the 'temubual' on 13 September 2010 where SP32 said that he had 'temubual' the fourth accused first, followed by the second accused and then SP29. Learned counsel then brought our attention to p 7027 of the AR Vol 2aj where SP32 categorically said that both the fourth accused and SP29 never gave any information simultaneously. According to learned counsel this is in sharp conflict with the first paragraph of Tanjong Sepat report, which is reproduced as follows:

> ... telah menemubual dua orang OYDS nama Kathavarayan A/L Rajodorai KP: 800103-10-5573 dan Suresh A/L Ulaganathan KP: 840624-08-5033. Saya telah menanya kepada kedua-dua OYDS di dalam Bahasa Tamil di mana mereka buang jam kepunyaan mangsa-mangsa. Kedua-dua OYDS jawab dalam Bahasa Tamil — Kami buang tiga jam tangan milik mangsa di Sungai dekat Kampong Endah dan kami boleh tunjuk sama tuan.

[86] Learned counsel submitted that the statement in the Tanjong Sepat report could not be reconciled with SP32's evidence in court in that in the Tanjong Sepat report SP32 stated that both the fourth accused and SP29 gave the information simultaneously to SP32.

[87] Next, learned counsel took us to p 7031 of AR Vol 2aj where SP32 was cross-examined by learned counsel for the first accused with regard to the 'temubual' at Sungai Pancau on 12 September 2010 ('the second complaint'). It was SP32's evidence in court that the three suspects were with him and his team. He named the three suspects as the fourth accused, SP29 and the second accused. It was his evidence in court that only the fourth accused provided the information as can be seen at p 7032 of the AR Vol 2aj. The relevant parts of the

cross-examination are re-produced:

> MSD: Selain dari Mr Karthavarayan, siapa lagi you soal?
>
> SP32: Karthavarayan sahaja Yang Arif.
>
> MSD: Seorang sahaja?
>
> SP32: Ya Yang Arif.
>
> MSD: Jadi you dapat jawapan dari satu orang sahaja, 3.45 petang di sana?
>
> SP32: Ya Yang Arif.

[88] Learned counsel then argued that the aforesaid evidence of SP32 completely and materially contradicted his own Banting report where SP32 clearly stated:

> ... jam lebih kurang 1545 HRS, dengan dipandu arah oleh OYDS Katharayanan A/L Rajadorai KP: 800103-10-5573 dan Thailaiyagan A/L Thanasagaran KP: 910412-14-6261 telah membawa saya bersama pasukan polis yang terdiri daripada ... ke Sungai Panchau, Jalan Morib. Sampai di situ saya bertanya kepada kedua-dua OYDS dalam bahasa Tamil yang bermaksud — Di mana tempat kamu telah buang abu mayat dan dia beritahu saya — Disinilah tempat — sambil menunjukkan jarinya ke arah dalam Sungai Panchau berhampiran paip air besar, Air Selangor, Kuala Langat ...

[89] Learned counsel argued that there were two material discrepancies in respect of the second complaint. First, in his evidence in court, SP32 said that there were three suspects, namely, the fourth accused, the second accused and SP29, whilst in the Banting police report there were only the fourth and second accused persons. And secondly, in his evidence in court, he said that only the fourth accused provided the information whilst in the Banting police report he stated that both the fourth and second accused persons provided the information at the same time. Hence, learned counsel added that these were contradictions that came within the striking range in *Muthusamy v Public Prosecutor* where these contradictions were unmistakably classified as 'material discrepancies', warranting an explanation from SP32.

[90] As stated earlier, the learned trial judge found that there were no material discrepancies between the police reports and the evidence of SP32 in court. The learned trial judge's brief grounds for his ruling can be seen at p 7036 of AR Vol 2aj as follows:

> ... ruling kedua tentang permohonan peguambela untuk impeach the credit saksi 32 berdasarkan pada apa yang tertera dalam laporan polis. Saya telah meneliti keterangan saksi ini dalam mahkamah dan juga saya telah meneliti tiga laporan polis yang dikemukakan dan adalah keputusan ringkas saya bahawa saya tak nampak apa-apa material contradiction di antara keterangan saksi ini dengan laporan polis

ini. Jadi saya tidak membenarkan permohonan peguambela untuk teruskan dengan impeachment proceeding berdasarkan percanggahan yang dikatakan berlaku di antara keterangannya dengan laporan polis ini.

[91] The Court of Appeal disagreed with the ruling of the learned trial judge as can be seen from the following passages of its judgment:

[103] Learned counsel had highlighted a number of contradictions but for purposes of this judgment, suffice if we state the following.

[104] In cross-examination by learned counsel for the first appellant, SP32 stated that with regard to the 3.45pm 'temubual' at Sungai Panchau on 12 September 2010, the fourth appellant, Suresh and the second appellant were with him but only the fourth appellant provided the information. This was in conflict with his Banting Report 007044/10 where SP32 had stated that only the fourth and the second appellants were with him and that both the fourth and the second appellants provided the information at the same time.

[105] We find that the above discloses a material contradiction between the evidence of SP32 and his police report and that the finding of the learned trial judge that there is no material contradiction is, with respect, perverse.

[92] In the circumstance, the critical question for us to determine is which of the courts below came to the right decision. To answer this, we have to scrutinise the evidence carefully.

[93] From the appeal record, it is clear that before the learned trial judge made the ruling as regards the impeachment application, learned counsel had highlighted relevant parts of the police reports which were considered inconsistent, before they were handed to the learned trial judge for consideration. This approach is consistent with the procedure laid down in impeaching the credit of a witness as set out in the case of *Muthusamy v Public Prosecutor* and the case of *Ong Joo Chin v Rex* [1946] 1 MLJ 1.

[94] We now turn to consider the first complaint. In the trial, SP32 stated that both the fourth accused and SP29 never gave any information simultaneously. In our judgment, the general tenor of his statement in the Tanjong Sepat report that '... Saya telah menanya kepada kedua-dua OYDS di dalam Bahasa Tamil di mana mereka buang jam kepunyaan mangsa-mangsa. Kedua-dua OYDS jawab dalam Bahasa Tamil ...' by and large accorded with his evidence in court. We had closely scrutinised the Tanjong Sepat report. A careful reading of the said Tanjong Sepat report disclosed that both the fourth accused and SP29 had given information to SP32 but it is particularly noteworthy that it did not explicitly state that the information was given simultaneously to SP32 by both of them, as submitted by learned counsel. A point to be borne in mind is that a police report is usually much shorter

(omitting the details of the events which had occurred) than evidence in court. Minor differences in matters of detail are bound to appear between the concise SP32's police report and his elaborate evidence in court. Such minor differences cannot be elevated to the rank of major discrepancies. That explains why we do not see any material discrepancies between the Tanjong Sepat report and the evidence of SP32 in court.

[95] Turning now to the second complaint, learned counsel submitted that in the first place there was a material discrepancy on the basis that in his evidence in court SP32 stated three suspects were with him, namely, the fourth accused, the second accused and SP29, whilst in the Banting report there were only the fourth and second accused persons. We do not find learned counsel's argument persuasive. In our view, in the context of the present circumstances, a mere omission to mention SP29 in the police report is hardly ever a discrepancy. The omission did not go to the crux of the matter. What is more, SP29 was not one of the accused persons in this case. Secondly, learned counsel submitted that there was a material contradiction in that in his evidence in court SP32 stated only the fourth accused provided the information and this was in conflict with the Banting report where he stated that both the fourth and the second accused persons provided the information at the same time. We disagree with this submission. It is plain for us to see from reading the Banting report that SP32 did not explicitly state that both the fourth and second accused persons provided the information to him at the same time. Contrary to the submission of learned counsel, SP32 stated that '... Di mana tempat kamu telah buang abu mayat dan dia beritahu saya — Di sinilah tempat — sambil menunjukkan jarinya ke arah ...'. The first thing to notice is that SP32 used the words 'dia' dan 'jarinya' (words in the singular) in the police report. This in itself indicates clearly that only one of the suspects provided the information, which is consistent with his evidence in court that only one suspect provided the relevant information to him at the relevant location and time.

[96] Based on all the above reasons, we conclude that the Court of Appeal was in serious error in holding that there were material discrepancies between the police reports and the evidence of SP32 in court. On the facts of the case we find that there were no material discrepancies in the evidence of SP32. Accordingly, there was no basis to impeach the credibility of SP32.

Denial of the right to contradict SP32 with his own police reports

[97] As can be seen at pp 7064–7065 of AR Vol 2aj, learned counsel for the second accused also applied to the learned trial judge to use the police reports of SP32 to contradict his evidence in court under s 145(1) of the EA, which provides that a witness may be cross-examined as to the previous statement made by him.

[98] The learned trial judge did not allow the application. The Court of Appeal took a contrary view but nevertheless held that there was no failure of justice as learned counsel for the accused persons had the opportunity to cross-examine SP32. The Court of Appeal observed as follows:

> [101] As a matter of fact, s 145 of the EA was relied upon by learned counsel for the appellants in making the application to impeach and to contradict SP32. On the authority of *Balachandran*, we find that the learned trial judge had committed an appealable error in his ruling that the police reports lodged by SP32 were inadmissible.
>
> [102] Be that as it may, we are of the view that the appellants had not been deprived of their rights to a fair trial as the appellants had every opportunity to cross-examine SP32.

[99] Before us, it was also submitted by learned counsel for the second accused that the learned trial judge erred in disallowing the application to contradict SP32 based on his police reports. Learned counsel argued that there was procedural and substantive unfairness in that the accused persons were deprived of the legal right to contradict SP32. Further, learned counsel submitted that the Court of Appeal erred in holding that there was no failure of justice. The Court of Appeal, according to learned counsel, failed to appreciate that the right to contradict SP32 is an essential and a key component of his cross-examination.

[100] Having examined the appeal record, we agree with the Court of Appeal that that there was no failure of justice as the accused persons had the opportunity to cross-examine SP32 as provided for under s 145(1) of the EA. It is important to note that the second application was made after the learned trial judge had dismissed the application to impeach SP32. As can be seen at pp 7024–7034 of AR Vol 2aj, the gist of learned counsel's cross-examination of SP32 revolved around the police reports made by SP32. He was subjected to a very thorough and searching cross-examination regarding the police reports.

[101] On the issue of the credibility of SP32, we thus conclude that the challenge mounted by the accused persons against the credibility of SP32 is without merit. In our judgment the credibility of SP32 was decided wholly on the facts and the prevailing circumstances of the case, based on the inherent probabilities of his testimony. As a trier of fact, the learned trial judge had the audio-visual advantage reserved to a trial court. We have no reason to disagree with the finding of the learned trial judge that SP32 is a credible witness. In view of that, we rule that the evidence of SP32 pertaining to discovery information under s 27 and evidence of conduct under s 8 of the EA are credible and reliable.

[102] We will now deal with s 27 evidence first and then s 8.

A SECTION 27 OF THE EA ISSUE

[103] Evidence was adduced to show that the second and the fourth accused persons had led the police team to the discovery of certain items ('the items') at various places near the farm. SP32 testified that the two accused persons supplied seven pieces of information, and they are as follows:

B

(a) the first piece of information is that on 12 September 2010 at about 10am, SP29, the third accused and the fourth accused brought SP32 and his men to the farm, which led to the discovery of a 'penyeduk tanah', bone pieces, nine blood stains, six fingerprints, cut wires, cigarette butts, a cricket bat, soil samples, a container with liquid explosive and a cut stained cushion. The DNA of Hisham was later detected on the cricket bat (P118B). These discoveries are recorded in Vol 2h pp 1545–1546 of the appeal record;

C

D

(b) the second piece of information relates to the information given on 12 September 2010, where about 3pm after SP32 had 'temubual' the fourth accused, he was led by both the second and the fourth accused persons to Sungai Panchau. There SP32 found items like a knife, bone fragments, wires, keys, metal parts, and a plastic bag with the words 'Tapioca starch, super high grade, 50 kg' printed on it. They were discovered in the river. We maintain the usage of the word 'temubual' as this was the word used by SP32 in the course of the court's proceedings. Furthermore, there was no serious challenge as regards the use of that word;

E

F

(c) the third piece of information was obtained on the same day (ie 12 September 2010) but at about 5.45pm. Pursuant to SP32's 'temubual', the second accused and the fourth accused led him to Kunci Air Pasar Besar, Banting where two Blackberry handphones, one white and one black, were discovered. The white Blackberry handphone (P39B) was owned by Kamil as confirmed by SP14 (his wife). The black Blackberry handphone (P28A) was owned by Hisham as identified by SP8 (his wife);

G

H

(d) the fourth piece of information was obtained on 13 September 2010 at 3pm after SP32 had 'temubual' both the fourth accused and SP29 at the IPD Kuala Langat. At about 3.30pm SP32 'temubual' the second accused and SP29. SP32 was then led by the second accused, the fourth accused and SP29 to Jambatan Kampung Endah, where a Seiko watch (P74A) was discovered. This watch was owned by Kamal as confirmed by SP97 (ASP Koh Fei Chieow);

I

(e) the fifth piece of information was obtained on 13 September 2010 at 6.20pm after SP32 had 'temubual' both the second accused and SP29. It led to the discovery of 14 pieces of burnt logs at a rubbish dump at Sungai Arak;

(f) the sixth piece of information was obtained on 14 September 2010 at about 11am SP32 was led by both the fourth accused and SP29 to Jambatan Sungai Kampong Endah where a Bell & Ross watch (P42A) was discovered. This watch was owned by Kamil as identified by SP14 ('Kamil's wife'); and

(g) the seventh piece of information was also obtained on the same date ie on 14 September 2010 at about 5.05pm. Pursuant to SP32's 'temubual', the second accused and SP29 led him to Sungai Ladang, Kelapa Sawit, Jalan Kenangan where six pieces of zinc sheets (P75A–P80A), with the help of divers, were discovered. SP86 (chemist) found traces of blood namely H16 and H17 respectively on zinc sheets P80A and P78A. The traces of blood on P80A were found to be those of Kamal. The traces of blood on P78A matched the DNA profile of Kamil's family.

[104] In a nutshell, SP32 testified that the second and fourth accused persons at the abovementioned times and dates had given information leading to the discovery of the items.

[105] If the above evidence of discovery were accepted, they would support the prosecution case of the involvement of the second and fourth accused persons in the murder of Sosilawati and the three others. As will be discussed later, these items discovered fall under 'circumstantial evidence'.

[106] We will deal first with the admissibility of the information given by the second and fourth accused persons under s 27 of the EA. In his grounds of judgment the learned trial judge stated that the information was given individually though questioned jointly. The learned trial judge was satisfied that SP32 had no prior knowledge of the scene of crime or the items discovered. SP32 would not have discovered them had it not been for the information supplied by the second and fourth accused persons.

[107] The Court of Appeal rejected the s 27 evidence on the basis that the information given by SP29 and the second and fourth accused persons were made jointly. It opined that s 27 of the EA does not contemplate joint statements by more than one accused.

[108] The Court of Appeal nonetheless had opined that the acts of the second and the fourth accused persons in leading SP32, and pointing, to the places where the items were discovered amounted to conduct under s 8 of the EA.

[109] Section 27 of the EA reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[110] In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, Ahmad Maarop FCJ at p 646 (MLJ); p 167 (CLJ), speaking for this court said:

> [28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information.

[111] We have no reason to depart from the above principle of law. The act of the learned trial judge in undertaking the TWT exercise was an unnecessary and waste of judicial time.

[112] Further, as to the approach in dealing with the evidence under s 27 of the EA, we are of the considered view that the correct test was applied in *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*, and adopted in *Public Prosecutor v Azilah bin Hadri & Anor*, as propounded in *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78. Suffian LP had formulated the twin tests which read as follows:

> ... What was the fact discovered? The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this.
>
> What was the information supplied by the accused relating distinctly to the facts thereby discovered? It was 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam' in the words of Mr Ong. All that evidence is admissible ...

[113] In the present case, the fact discovered embraces the area near the farm where the items were discovered by the police. The information given by the second and fourth accused persons indicates their knowledge of the place and the items.

[114] The most cogent argument forwarded by the second and fourth accused persons was that they had made a joint statement, an issue which was not contemplated by s 27 of the EA. We were referred to by learned counsel for the parties of the case of *Govind Krishna Jadhav v State of Maharashtra* (1980) 82

BOMLR 173, where it stated:

> ... The joint statement is a statement made by two persons simultaneously. Such a situation is practically inconceivable especially with reference to section 27 of the Evidence Act. Two or more persons cannot in chorus make a statement contemplated by section 27. A joint statement must in practice mean the same statement or similar statements made by two or more persons. In such a case only the statement which is made earlier and which leads to the discovery will be admissible under section 27 of the Evidence Act and the subsequent statement or statements will not be.

[115] In reply, it was submitted by the prosecution that even though the second and fourth accused persons provided the information that led to the discoveries, there was no evidence whatsoever establishing that both of them had given joint statements.

[116] However, in the present case before the need arises to discuss the legal issue, whether a joint statement made by the second and fourth accused persons is contemplated or otherwise under s 27 of the EA, we are of the view that we should first satisfy ourselves whether a joint statement was indeed made by them. If no joint statement was made then the matter ends there.

[117] A scrutiny of the appeal record shows that the learned trial judge in his grounds of judgment in no uncertain terms had found that the information, which led to the discovery, was given individually though questioned jointly. This confirmation was elicited from SP32.

[118] Since we have already accepted that SP32 is a credible and reliable witness, we therefore hold, as testified by SP32, that there was no evidence of a joint statement having been made by the second and fourth accused persons. This alleged joint statement issue must therefore be rejected.

[119] We now deal with the question of whether the version of the discovery statement put forward by SP32 was accurate enough to be acted upon. In *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*, the Court of Appeal said this:

> Accordingly, the first question that a court must ask itself is this: Did the accused ever make a discovery statement? This turns on the credibility of the policeman who gives evidence of the discovery statement. If the court is satisfied that the first question must be answered in the negative, that is to say, that the alleged statement is a fabrication, then that is the end of the matter and no further steps in the inquiry are necessary. But if the court decides that the first question should receive an affirmative response, then it must ask itself the second question. Is the version of the discovery statement put forward by the policeman giving evidence of it accurate

enough to be acted upon? If the accuracy of the statement is in doubt then it should be rejected. Otherwise it should be accepted.

(The tests above have been affirmed by the Federal Court in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773.)

[120] As we are satisfied that the second and fourth accused persons had given information separately to SP32 and had led the police to the areas near the farm where items connected to the murder were discovered subsequently, we find that the statement which led to the discovery was accurate. Accordingly, contrary to the finding of the Court of Appeal, we are inclined to agree with the learned trial judge that the s 27 evidence is admissible.

[121] We are equally satisfied that, if not for the information supplied by the two accused persons, the police would not have successfully completed the investigation (*Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176).

[122] There was also no plausible reason why the police would have play-acted the discovery of the items.

ISSUE OF CONDUCT — SECTION 8 OF THE EA

[123] We now address the submissions of parties regarding the issue of conduct. This section reads as follows:

> 8 Motive, preparation and previous or subsequent conduct
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> (1) ...
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1 — The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

[124] The Court of Appeal in its judgment (para 22) on this issue in clear terms agreed with the learned trial judge that the acts of the second to the fourth accused persons in taking SP32 and pointing to the places where the items were discovered, amount to conduct which is admissible under s 8 of the EA.

[125] Learned counsel for the second and fourth accused persons before us submitted that the evidence of SP32 regarding them pointing to the location which led to the discovery of the abovementioned items did not inspire confidence; therefore the evidence of their conduct pointing to the locations and implicating them was completely unreliable and must be rejected. Alternatively, it was submitted that even if both accused persons did indeed point in the direction of the items, those acts of pointing did not irresistibly connect them to the murder of Sosilawati and the three others.

[126] We hold the view that, like the s 27 issue, SP32's credibility likewise plays a major role in the s 8 issue. As the second and fourth accused persons have failed to successfully challenge the credibility of SP32 in relation to the s 27 issue, that finding also holds him in good stead regarding the conduct issue vis a vis the second and fourth accused persons.

[127] At any rate it is apposite to clarify here that even if information pursuant to s 27 of the EA is found inadmissible, that piece of inadmissible evidence does not automatically affect the admissibility of the evidence of subsequent conduct under s 8 of the EA (*Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109; *Prakash Chand v State (Delhi Administration))*.

[128] That conduct of pointing to the places where the items were discovered by the second and fourth accused persons, which was subsequent to an offence, falls squarely within the ambit of 'the conduct of any person an offence against whom is the subject of any proceeding'.

[129] As held by the Court of Appeal, we hold that the conduct of pointing to the places where the items were found is relevant and admissible (*Prakash Chand v State (Delhi Administration)* 1979 AIR 400). Chinnappa Reddy J said at p 404:

> The evidence of the circumstances, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of section 27 of the Evidence Act ...

[130] The conduct of the second and fourth accused persons is consistent with them knowing of the places where the items connected to the crime of murder were disposed of. This view is consistent with the view held by the learned trial judge where he said:

> The only inference that I could make on the conduct of the second and fourth accused in providing the information in this case was that they were in possession of the items found and had tried to destroy and conceal these items by scattering and leaving them at various places.

[131] We are also satisfied that the act of pointing by the second and fourth accused persons at the spots where items connected to the murder were found is admissible as conduct, as provided for under s 8 of the EA.

ON DNA EVIDENCE

[132] In respect of the issue on DNA evidence in the present case we noted that the emphasis by learned counsel for the accused persons was only in connection with the discovery at the farm of a cricket bat with blood droplets (P118B) and bloodstains on the walls of the rooms where the second and third accused persons stayed (with cotton swabbings done) and also on the zinc sheets (P75A, P78A and P80A). The findings were incorporated in P600 as the DNA report by SP86. In essence SP86 found that the DNA identified from the blood droplets on P118B matched the blood of Hisham's biological mother, father and children. The bloodstains found on P75A and P78A matched that of Kamil and P80A that of Kamal. The testimony of SP86 and P600 were challenged on the ground of hearsay evidence.

[133] On this aspect of the evidence the learned trial judge found, inter alia, that:

> There was also a cricket bat pointed out by the second and fourth accused at the farm at the place where the third accused stayed. On the cricket bat there were suspected blood droplets on which cotton swabbing was done. Similarly cotton swabbing was done on the walls of the rooms where the second and third accused stayed on the farm.
>
> ...
>
> When the chemist SP86 did an analysis of all the swabs taken from the zinc as well as the cricket bat and the walls, they clearly matched the DNA to the three members of Sosilawati's entourage. SP86's expertise on DNA analysis to me was unmatched as he had done numerous such analyses and had the necessary qualification as well had acquired adequate knowledge over the years to do such analysis.
>
> ...
>
> On of the grounds expressed by the defence against the DNA results obtained was (sic) the reading on the equipment did not comply with the manufacturer's specification. According to SP86 the equipment in the PJ Chemistry Department was set at RFU reading of 50 which was different from that recommended by the manufacturer. According to SP86 this did not go against the International standard

in setting the equipment. Each lab was at a liberty to set the standard of the equipment deemed proper. In the absence of any evidence to the contrary I accepted the explanation on this issue.

Putting to rest the issue of DNA analysis it was my finding that proper procedures had been followed in not only analysing the swab samples taken but also in taking the blood samples from the related persons.

[134] The Court of Appeal agreed with the findings of the learned trial judge on the issue and said this:

[143] The Director of the Forensic Division department and also the Head of Forensic DNA Serology Section, Chemistry Department, Lim Kong Boon (SP86) had analysed the blood/tissue sample from the cricket bat and swabs from the wall of a premise in the farm. SP86 found that the cricket bat had a DNA of Hisham and that the DNA on the Swab 9 from the wall matched that of immediate family members of Hisham. The zinc sheets were also analysed where the result revealed that three zinc sheets exhs P80A, P78A and P75A had the DNA of Kamal and Kamil. The complaint of the appellants was that the evidence of SP86 was hearsay as his assistants or lab assistants did the 'ground work' for him.

[144] SP86 had specifically testified that the officers who had assisted him in this case were under his close supervision and under his strict instructions. SP86 gave oral evidence as regards his analysis and he tendered his report exh P600. It is an established principle of law that the chemist is not required to go into details of what he did in the laboratory step by step. So long as the chemist is able to give credible evidence to support his opinion, the court is entitled to accept such opinion unless there is in rebuttal an opinion of another expert (see *Munusamy v PP* [1987] 1 MLJ 492). In the instant case, there is no rebuttal expert evidence. We therefore disagree with the appellants that the evidence of SP86 is hearsay and inadmissible. In our view, the fact that the chemist is assisted by other officers does not ipso facto render the evidence of the chemist hearsay. And we find no reason to depart from the findings of the learned trial judge who had accepted the evidence of SP86.

[145] As to the presence if unknown male DNAs on the cricket bat and the cigarette but as well as fingerprints, we take note that the farm is on open place and there are other occupants residing at the farm. The existence of unknown male DNAs on the cricket bat and the cigarette butts is immaterial. It does not negate the fact that the DNA of Hisham was on the cricket bat which shows that Hisham was at the farm and the presence of blood irresistibly points to the fact that the bat was used on Hisham. Similarly the DNA of Kamal and Kamil found on the zinc sheets which were recovered as a result of the second appellant and Suresh showing the place of recovery to the police provided the link or nexus between Kamal and Kamil to the appellants. This evidence shows that at least these three victims were at the farm.

[146] As for the contention that there was cross-examination of the exhibits, we find no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and/or the medical officers are vitiated.

[135] Before us learned counsel for the first accused, supported by learned counsel for the second and third accused persons, submitted that P600 should not have been admitted in evidence on the ground of hearsay for the following reasons:

(a) that SP86 admitted under cross-examination by learned counsel for the first accused that he was not the person who actually carried out the entire analysis upon which P600 was based; and

(b) that the scientific officers and other laboratory officers who conducted the various tests were never called to testify during the trial.

[136] Learned counsel for the third accused in supporting the contention of learned counsel for the first accused submitted the following additional reasons:

(a) that the DNA profiles which were developed from the zinc sheets and cricket bat were degraded and therefore could not produce complete results;

(b) that there was possibility of cross-contamination and secondary transfer of the DNA evidence looking at the manner the zinc sheets were collected, packaged and preserved. Some of the zinc sheets, when discovered, were wet, they ought to have been thoroughly dried before they were packed to prevent degradation of any biological evidence;

(c) that the threshold (Relative Fluorescent Unit (RFU)) used in this case was not in accordance with the manufacturer's recommendation of the machines that SP86 or his officers utilised to carry out the analysis;

(d) that the farm on which the DNA evidence was discovered was never secured or guarded by the police from the date of arrests of the second, third and fourth accused persons. The failure to secure or guard the alleged crime scene had serious implications or consequences in relation to the acceptance, probity and probative value of the exhibits/evidence discovered during that interval of 9–12 September 2010;

(e) that the prosecution was not able to rule out the possibility that the evidence discovered on 12 September 2010 might have been compromised or that the evidence could have only surfaced or appeared after 9 September 2010;

(f) that the worst part of it was the prosecution's failure to call other occupants of the farm who continued to stay on the farm during that period; and

(g) that none of the DNA evidence could relate back to the guilt of the third accused. The locations from which the zinc sheets, for instance, were discovered, were pointed out or led by the third accused. In fact there

was no solid evidence to implicate the third accused in the commission of the crime, other than being at the farm on the fateful date.

[137] As stated earlier the main thrust of the submissions of learned counsel for the accused persons is that P600 should not have been admitted on the ground of hearsay evidence. They said that those laboratory officers should have been called to testify on their roles in conducting the tests and analyses. Learned counsel for the first accused went on to submit that just because those laboratory officers were under supervision and instruction did not mean that they actually complied with 'the strict controls and regimes necessary in DNA testings'. As such if those officers were called to testify they would have been subject to cross-examination on what and how the tests were done.

[138] With respect, such argument ignores the point that DNA evidence is admissible under ss 45, 46 and 51 of the EA. It is basically opinion evidence of an expert. And generally experts rely on test results and data that are not necessarily obtained or conducted by them personally in coming up with their opinion. It is more of them examining and interpreting those test results and data presented before them.

[139] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 this court said this at para 172:

> When considering whether we should accept PW5 and PW6's evidence, we must first conclude that their evidence would fall under that of an expert's opinion, and we have no doubt they are experts. As regards the opinion of an expert, it was observed in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 as follows:
>
> > ... the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step,
>
> (*Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391 and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151).

[140] Under English law the general rule is that expert evidence is admissible provided that it is reliable and relevant. Reliability and admissibility of DNA evidence have been discussed in several cases such as *R v Doheny and Adams* [1996] Lexis Citation 5150; [1996] EWCA Crim 728 and *R v Broughton* [2010] EWCA Crim 549.

[141] In Singapore, ss 47, 48 and 53 of the Singapore Evidence Act (Chapter 97) are relevant in considering the admissibility of expert evidence

while s 62 of the same Act deals with the hearsay rule as applicable in Singapore.

[142] There is no clear provision in the Singapore Act or any court decision that allows an expert witness to rely on test results and data obtained by another person. Only a view has been expressed that 'In practice, an expert will not have himself performed all the experiments or asked all the questions or conducted all the interviews personally of the person under examination and may be relying on the hearsay of his assistant or employee. But the courts may take the view that there is no reliance on hearsay of an assistant or employee where the assistant or employee was under the supervision of the expert' (see *Halsbury's Laws of Singapore* Vol 10 (2000) para 120.255 at p 339).

[143] In respect of ss 48 and 53 of the Singapore Act, there are at least two views on their interpretations. The first view is that on plain reading of s 48 which provides that 'Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant' and s 53 which states that, 'Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant', they 'appear to be wide enough completely to circumvent the stipulation for direct evidence in s 62 by rendering any evidence admissible so long as it forms the grounds of the expert's opinion or tends to confirm or undermine his opinion'. The second and preferred view is that 'these sections do not punch such a large hole in the direct evidence rule found in s 62(1). Since an opinion is valueless unless the grounds on which it is based are known, these sections should be seen as merely being a necessary corollary to the admission of expert evidence under s 47. The evidence admitted under these sections is admitted merely to reveal the basis of the opinion and can be used only to bolster or undermine the credibility of the opinion. Such evidence is not admitted to establish the truth of those facts, which must be proven by other, admissible evidence'. Hence, the concluding view is that 'a failure sufficiently to prove facts underlying an expert opinion will affect only the weight accorded to the opinion. Even if the failure to prove the foundational facts is so extensive as to deprive the opinion of any basis at all, the opinion will thereby be rendered useless and irrelevant, rather than inadmissible' (see *Report of the Law Reform Committee on Opinion Evidence*, October 2011 Singapore Academy of Law; *Gunapathy Muniandy v Dr James Khoo* [2001] SGHC 165).

[144] In other words, facts underlying an expert opinion are not inadmissible on the ground of hearsay. Rather, the failure to sufficiently prove those underlying facts would only affect the weight to be given to such expert opinion.

[145] Having therefore considered the submissions of learned counsel for the accused persons and the legal principles on DNA evidence as applicable in this

country and in other jurisdictions, we are in agreement with the view of the Court of Appeal that there is no basis to say that the findings and testimony of SP86, and P600, should not have been admitted on the ground of being hearsay evidence. P600 is a scientific report by SP86, an unchallenged expert, derived from his examination, analysis and interpretation of the test results and data secured by his officers directly under his supervision. As such we are of the view that there is no necessity for the prosecution to call each and every laboratory officer assigned and supervised by SP86 to carry out the required tests upon which P600 was premised. The crucial part was the examination, analysis and interpretation on those test results and data carried out by SP86 in producing P600. In fact there was no challenge made on the method adopted by SP86. During the trial there was also no allegation of unreliability of any of the test results and data secured by the laboratory officers.

[146] Moreover, there was no rebuttal expert called by the accused persons to challenge the test results and data interpreted by SP86.

[147] Accordingly, we find no merit on this issue as raised by learned counsel for the first, second and third accused persons.

MOTIVE

Prosecution submission on motive

Cheques (P162 and P163)

[148] The prosecution contended that the motive for the murder can be inferred from the following facts. The evidence of SP15 showed that the purpose of Sosilawati's visit to Banting was to meet the first accused to expedite payment for the two cheques totalling RM4m, as she wanted the money to give bonus to her staff and as expenses for the upcoming Hari Raya Aidilfitri.

[149] In this connection, the prosecution adduced two Hong Leong Bank cheques in the sum of RM1m (P162) and RM3m (P163). Both cheques were dated 9 September 2010 ie one day prior to Hari Raya Aidilfitri. The cheques were issued by 'Pathmanabhan a/l Nallianen', the first accused, under account No 04100025376 to be paid to 'Southern Symphony Sdn Bhd' (Sosilawati's company).

[150] The prosecution submitted that according to Yvonne Tiong Guat Choo (SP98) the Operation Manager at Hong Leong Bank, as at 30 August 2010, the balance in the first accused's account (04100025376) was RM1,383,943.85. In other words, the first accused had insufficient funds to clear the two cheques

amounting to RM4m or even RM3m if those cheques were to be presented for payment before Hari Raya Aidilfitri or on 30 August 2010.

[151] The first accused was thus under financial pressure to come up with the money and the solution was to get rid of Sosilawati and the three others. The prosecution submitted that, in the circumstances, the issue of motive is relevant to the case. The motive being the insufficient funds in the first accused's account to honour the cheques totalling RM4m issued to Sosilawati.

[152] The prosecution submitted that this piece of evidence remained unchallenged as the first accused failed to explain the issue of insufficient funds. It was contended that at the defence stage, the first accused failed to explain how he could have honoured the cheques issued to Sosilawati.

Defence submission on motive

The cheques (P162 and P163)

[153] Learned counsel for the first accused submitted that the first accused owed no money to Sosilawati and the cheques did not represent sale proceeds of any land in Penang. The prosecution led no evidence to show that there had been a sale of land in Penang by Sosilawati in 2010 or that the money had come in from such a sale and was due to her.

[154] Learned counsel for the first accused further submitted that the prosecution misled the learned trial judge and hence the learned trial judge erred in his findings in calling for the defence when he stated:

> ... the first accused had no money in his account to honour the cheque issued to Sosilawati as payments for the sale of land in Penang. This to me was a very compelling reason to kill Sosilawati. I find that this motive was more probable motive leading to the killing of Sosilawati; and
>
> The amount of the cheque represented part payment of the sale of the Penang land.

[155] Learned counsel for the first accused submitted that the prosecution tried to make a meal of photocopies of cheques without realising that the first accused's personal account on which the cheques were issued had been frozen. No evidence was led by the prosecution to show that there were no arrangements for facilities or overdrafts in the first accused's personal account, and thus nothing turns on the cheques. He contended that the cheques were just mere post-dated cheques for loans. Similarly, he submitted that the Court of Appeal would not have come to the same findings had it properly evaluated this evidence.

[156] Learned counsel for the first accused further submitted that the first accused owed no money to Sosilawati and in fact the 10% deposit she received in respect of the land in Penang had been disbursed to her, Suhaimi and Saberi since 2008. He submitted that the investigating officer ('IO') ASP Mohamad Ishak bin Yaakob (SP99) confirmed that Sosilawati was involved in a Penang land transaction where the first accused was the solicitor. The transaction was through a company called Southern Symphony. The prosecution led no evidence concerning this company. There is no evidence to suggest that there was anything irregular or illegal about the land transaction. He submitted that the land had been sold to Ample Quality Sdn Bhd ('AQSB'). Rahman Palil, Lee Lai Heng and Sukumaran were the shareholders and directors of AQSB. Southern Symphony confirmed receipt of RM2.9m. Therefore, Sosilawati had already received the money.

[157] Learned counsel for the first accused submitted that there was a letter dated 2 August 2010 from Lee Lai Heng, Rahman Palil's business partner, concerning the proposed sale of the land in Penang of which matters SP99 chose not to investigate. He submitted that AQSB (Rahman Palil's company) had only paid RM2.9m as 10% deposit to Sosilawati, but was negotiating to sell the land for RM200m — an anticipated profit margin of approximately RM171m. He also submitted that SP99 agreed that in August 2010 the land was still Sosilawati's and if Sosilawati were to pull out, then AQSB (Rahman Palil's company) stood to lose millions of Ringgit.

[158] Learned counsel for the first accused further submitted that the IO (SP99) knew that Sosilawati attended a function in the evening of 28 August 2010. It was suggested to SP99 that Sosilawati was seated next to Rahman Palil at the function. SP99, however chose not to investigate. He concluded by saying that the suggested meeting between Sosilawati and Rahman Palil on 28 August 2010, just two days before she was alleged to have disappeared, should assume great significance.

[159] Learned counsel for the first accused also submitted that, premised on the evidence before the court, there is no evidence of motive on the part of the first accused to be rid of Sosilawati and the three others. He said that the two cheques according to the first accused were merely for a loan from the first accused to Sosilawati and that even assuming he did not have sufficient funds to honour the two cheques that was not sufficient reason to impel him to commit the murder.

[160] Section 8(1) of the EA stipulates that motive is a relevant fact. It reads:

8 Motive, preparation and previous or subsequent conduct

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

...

[161] Ratanlal & Dhirajlal's, *Law of Crimes, With List of Malaysian Cases*, (24th Ed) Vol 2, at p 1391 summarises the law on motive in the following words:

158. Motive is the ultimate end which a person hopes to achieve whereas intention is the immediate effect of his act. Motive is something which prompts a person to form an intention. The motive behind a crime is a relevant fact on which evidence can be given. Absence of motive is also a circumstance which is relevant for assessing the evidence. Proof of motive satisfies the judicial mind about the authorship of the crime but the absence does not ipso facto result in the acquittal of the accused. Motive is not a sine qua non to prove the case of the prosecution. Absence of proof only demands deeper forensic search and cannot undo the effect of evidence if otherwise is reliable and sufficient.

[162] In *Molu And Ors v State of Haryana* AIR 1976 SC 2499, the Indian Supreme Court aptly observed:

It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes, the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is creditworthy and is believed by the court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant.

[163] The Court of Appeal in *Abdul Samid bin Edward v Public Prosecutor* [2015] 4 MLJ 58; [2015] 4 CLJ 149 made similar remarks which read:

Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged.

[164] Similarly, Sinha J in *Atley v State of Uttar Pradesh* AIR 1955 SC 807 at p 810 stated:

Where there is clear proof of motive for the crime that lends additional support to the finding of the court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. If the prosecution has proved by clear evidence that the appellant had reasons of his own for getting his first wife out of the way, that would have lent additional assurance to the circumstantial evidence pointing to his guilt. But the fact that the prosecution has

failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined.

[165] We wholly endorse the observations made above in that motive is an important factor but not an ingredient of an offence to be proved in cases which turn on circumstantial evidence as in the present case. That said, it does not mean that where evidence of motive is vague, non-existent or not clear, an accused is exculpated provided there is sufficient evidence pointing to his guilt.

[166] Having considered the matter, we agree with the defence that evidence of motive as adduced by the prosecution is far from being satisfactory. At one stage, the prosecution contended that the unavailability of sufficient funds in the bank account of the first accused was the motive for the murder of Sosilawati and the three others. Later, the prosecution referred to the Penang land transaction as the motive behind the murder. In the circumstances, we hold that the evidence as regards motive is far too equivocal to be of any value.

[167] However, as said earlier, motive may be helpful in assisting the court in coming to its decision but the absence of such evidence is not fatal to the prosecution case (see *Bhikari Behera v State of Orissa* 1995 CriLJ 2998 at p 3000; and *Rangi Lal And Ors v State of UP* 1991 CriLJ 916 at p 921).

[168] With that observation at the forefront of our minds, we now move to consider the circumstantial evidence before us in greater detail.

CIRCUMSTANTIAL EVIDENCE

[169] Having dealt with the issues raised by the defence before us, we now turn to the issue of whether the convictions of the accused persons are safe premised on the circumstantial evidence before the court.

[170] As stated earlier, the bodies of Sosilawati and the three others in relation to whose murders the four accused persons were charged under s 302 read with s 34 of the Penal Code were never found.

[171] Not a single witness gave evidence of having seen the deceased bodies of Sosilawati and the three others, or of having seen them being inflicted with injuries leading to their demise.

[172] In other words, the incriminating evidence against each of the four accused persons if any was wholly circumstantial in nature.

[173] The law is well settled on the standard of proof required in criminal cases where the evidence presented before the court to prove the commission of the offence by the accused person is circumstantial in nature.

[174] In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307, Thomson CJ, said that '... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope'.

[175] In *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229, Abdul Aziz Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal said:

> ... As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v Public Prosecutor* [1960] MLJ 296 at p 297; [1960] 1 LNS 40:
>
> > With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875–6 Appeal Cases, p 279:
> >
> > > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
>
> In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all ...

[176] In his judgment, the learned trial judge found that there was sufficient evidence to support findings of guilt against all the accused persons. He stated:

> (b) Circumstantial Evidence
>
> [186] Circumstantial evidence as opposed to direct evidence is allowed and regarded as sufficient under the law to prove a case and sustain a conviction. To me direct evidence for the purposes of this case would be where a witnesses testifies seeing an offence happening before his eyes. There was such a witness in this case in the form of SP59 but unfortunately his evidence was discredited in this case and his admission to the facts of seeing Sosilawati and company being killed in another proceeding could not be considered as direct evidence for the purposes of this case.

[187] The court was therefore left with circumstantial evidence in determining whether the prosecution had proven a prima facie case. What amounts to sufficient circumstantial evidence was very aptly put by Lord Cairns in the case of *Bel Haven & Stenton Peerage* as quoted in the case of *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229 as follows:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united form of all the circumstances put together. You may have a ray light so feeble and that by itself will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavoring to dispel.

...

[267] As a final piece on this issue I was satisfied that the facts contained in P711 and P712 were cogent evidence against the accused but on its own were insufficient to sustain a conviction against the accused. I would in fact go as far to say that even without P711 and P712 the prosecution had led sufficient circumstantial evidence against the accused.

[177] The Court of Appeal agreed with the findings of the learned trial judge and made the following observations:

[69] In the final analysis, the learned trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death.

[70] Aggrieved by the convictions and sentences, the appellants appealed to this court.

The Appeal

[71] Learned counsel for the respective appellant had put up an extensive written and oral submission. To avoid repetition, they had each submitted on specific issues and in so doing had adopted the submission of the other. We noted that essentially the complaint in this appeal was directed at the findings of the learned trial judge at the end of the prosecution case where it was submitted that the prosecution had failed to make out a prima facie case against the appellants; that the prosecution led no evidence, direct or circumstantial, that the four alleged victims named in the charges are dead or have been murdered, and if so, how, when, where, why and by whom.

...

Conclusion

[185] It is our judgment that at the end of the prosecution case, the learned trial judge had correctly called for the defence. From the direct evidence of family members, friends and SP33, taken together with the circumstantial evidence in the form of the CDRs, the forensic and the DNA evidence which established the presence of Sosilawati and company at the farm, it could be safely inferred that Sosilawati and company had met their deaths at the farm. The knowledge that the

second, third and the fourth appellants had of the places where the incriminating items were found and their conduct in showing those places to the police is a definite pointer towards the guilt of the appellants.

[186] The phone calls from Kamil and Hisham that Sosilawati had problem with her driver, Kamal and that they would be going to Genting Highlands for three days was a version that is difficult to believe, incredible and improbable. It was the holy month of Ramadhan and it was highly unlikely that they would at the spur of the moment, decide to go to Genting Highlands. And why Genting Highlands to sort out the alleged problem that Sosilawati had with Kamal? In our view, it is more probable that they were forced to make the calls to deviate the attention from the first appellant and Banting.

[187] At the conclusion of the trial, we are satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. The evidence of the fourth appellant corroborated SP33 in material particulars. In fact, the evidence of the fourth appellant had strengthened the prosecution case. We do not lose sight of the fact that the DNA of Sosilawati was not found on either the cricket bat, the swabs of bloodstains on the wall or on the zinc sheets.

[188] Notwithstanding the above, we are of the view that the inferences to be drawn from the facts and circumstance of this case unerringly lead to the conclusion that within all human probability, Sosilawati is dead and that the appellants were the perpetrators leading to her death as well as the death of Kamal, Hisham and Kamil. The principles set out in *Sharad Birdhichand Sarda*, in our view, had been met by the prosecution.

[189] Taking the evidence cumulatively, we find that the convictions of the appellants are safe. We therefore unanimously dismiss the appeals and we affirm the convictions and sentences of the appellants.

Our findings on the circumstantial evidence

Were Sosilawati and the three others at the farm?

[178] In our view, what must first be established is that Sosilawati and the three others were at the farm during the time stated in the charges. We will now scrutinise the evidence.

Evidence by friends and family of Sosilawati and the three others of their going to Banting on the day in question

[179] Evidence of Sosilawati and the three others going to Banting on the day in question may be gathered from the following witnesses who are family members of Sosilawati and the three others. First, the evidence of SP16. SP16 gave evidence that she accompanied Sosilawati to Johor Bahru on Wednesday, 25 August 2010, and Sosilawati told her that she was going to meet the first accused on Monday in Banting to change the cheques given to her by the first

accused as the cheques were post-dated to a date after Hari Raya. Sosilawati asked SP16 to accompany her to meet the first accused, subject to subsequent confirmation by Sosilawati.

[180] SP16 waited for Sosilawati to call and when there was no call she assumed that Sosilawati did not need her company to Banting. SP16 then called Sosilawati around 5pm on the day in question and was told by Sosilawati that she was already on the way to Banting. Sosilawati informed SP16 that she was with Kamal, Hisham and Kamil.

[181] Further, Junaidah bt Ismail ('SP13'), a friend of Sosilawati gave evidence that on the night of 29 August 2010 Sosilawati by telephone told her that she was going to Banting the next day. Sosilawati invited SP13 to go along with her but SP13 declined as she was unwell.

[182] SP15 met Sosilawati in their office around 12 noon on the day in question and was told by Sosilawati that she was going to Banting to meet 'lawyer Pathma' that day, accompanied by Hisham and Kamil. Around 3pm, Sosilawati told SP15 that if the driver (Kamal) did not come, she (SP15) was to accompany her to Banting. But Kamal did come and Sosilawati left the office around 4pm. According to SP15 Sosilawati told her that she (Sosilawati) was in a hurry, so that they could break their fast in Banting.

[183] SP14 gave evidence that her husband (Kamil) had told her two days prior to the day in question that he was going to Banting with Hisham and Sosilawati with regard to a land matter. He called her again at 4pm on the day in question to remind her that he would not be breaking fast with her and family as he would be in Banting.

[184] SP8 gave evidence that when her husband (Hisham) took her to her office in the morning on the day in question, he told her that he was going to Banting that afternoon with Kamil and Sosilawati to attend to Sosilawati's business.

[185] SP7 gave evidence that Sosilawati stopped by the shop where she worked in Banting. The shop sold 'kerepek' and cakes. SP7's recollection was that Sosilawati stopped by around 4pm on the day in question and bought RM200 worth of 'kerepek' and cakes from the shop. She left around 5.20pm with her driver in a BMW car.

[186] Chief Insp Mazli bin Jusoh ('SP25') who examined Sosilawati's black BMW with the registration No WTL 11, found several plastic packets of 'kerepek' and cakes in the car. SP25's evidence goes to corroborate the evidence of SP7 that Sosilawati bought 'kerepek' from her shop.

[187] SP15 further testified that around 7pm on the day in question, Kamil called her and she asked Kamil where they were going to break their fast. Kamil replied 'entah mak engkau bawa pergi hutan mana entah'. He also said 'pokok kelapa sawit'. When SP15 asked where her mother was, Kamil told her that Sosilawati was in the car in front of him. The telephone was then passed to Hisham who then told SP15 that he was in Kamil's car and that he parked his car in Section 7 in Shah Alam.

[188] From the evidence given by SP41, the CDRs kept by Celcom showed that a telephone call did take place at 6:53:46pm on the day in question between telephone No 0192266222 used by Kamil and SP15's phone number, although the record indicated that it was SP15 who called Kamil's telephone number. The CDR showed that the call was received when telephone No 0192266222 was within the Batu Laut site, which is in Banting.

[189] At 7:54:02pm a telephone call was made by Kamil's number to his wife's number (0192626226). The caller was then within the Batu Laut site. However, subsequent telephone calls to Kamil's number went direct into his voice mailbox.

[190] At 8:04:03pm a telephone call was made from Hisham's number to SP8's number. The CDR showed that the call site was Batu Laut.

[191] Telecommunication records kept by Celcom also showed that telephone calls were made on the day in question from the number used by Sosilawati (0192295153) to the number registered under the first accused's firm. The calls were made at 5:59:04pm and 6:01:25pm, respectively. The calls were captured by the TM transmitter in Banting.

[192] Telephone calls were also made on the day in question from Kamal's Digi telephone number to Kamil's number at 6:31:26pm and shown to have been received at a location in Jenjarom, in the Kuala Langat district.

[193] The CDR showed that Sosilawati and the three others around 7pm on the day in question were proceeding towards a location in the area of Banting/Batu Laut. The farm is located in Tanjung Sepat, in the same vicinity.

[194] SP33 gave evidence that around 7pm on the day in question she saw a woman with long wavy hair and wearing a blue jacket arrive at the farm together with three men. She could not see their faces as they were facing away from her.

[195] At about 9pm, SP33 heard the sound of a woman screaming, twice, one or two seconds apart.

Finding

[196] From all the above evidence cumulatively only one irresistible inference can be made: that Sosilawati and the three others went to Banting and arrived at the farm around 7pm in the evening of the day in question.

Were Sosilawati and the three others killed at the farm at the time stated in the charges?

[197] SP33 gave evidence that on 29 August 2010 sometime after 3pm she saw a lorry entering the farm and deliver a number of logs. The logs were initially unloaded by SP29, the second accused and the third accused at the location she showed in P4(20). Around 5pm, she saw SP29, the second accused and the third accused moved the logs to the place marked 'A' on photograph P4(62).

[198] According to SP33, in the morning of 31 August 2010 when she delivered drinks at the 'pondok rehat', she did not see the logs at the site.

[199] SP33 also testified that on the day in question, before hearing the screams, Jesyntha (the fourth accused's wife) directed SP33 to prepare a pair of track bottoms, a brown sleeveless shirt, a brown and blue t-shirt with sleeves, shampoo, soap, powder, a towel and turmeric. These were wrapped up in newspaper and put inside a pail. Then the pail was placed outside behind the back door by SP33.

[200] Around 1am (31 August 2010), SP33 said that she was instructed by Jesyntha to retrieve from the karaoke hut the items she had put outside earlier. On the way to the karaoke hut, she saw a huge fire at the back portion of the farm, near the house where she said the second accused lived. The fire reached the height of the oil palm trees. SP33 marked the site of the fire as 'A' on the sketch plan P111.

[201] According to SP33, earlier, after midnight, she also saw through the glass window panes the fire as a huge reddish glow. She stated that the fire appeared to be blown by the wind.

[202] In the karaoke hut, SP33 saw items strewn about. She saw a knife, turmeric mixed with water, a handphone battery, a damp towel and the brown shirt.

[203] Supt Soo Mee Tong ('SP48') and his forensic team were called by SP99 to conduct investigations at the farm. He and his team went to the farm on 12 September 2010.

[204] SP48 and his team found an area where burning was suspected to have taken place ('burn site'). That area was situated to the left rear part of the farm. This site, according to SP48, was the site shown in photographs P10(61–63). He saw goat droppings spread all over the site and they were covered with zinc sheets and pieces of wood. This site matched the site marked by SP33 as 'A' on the sketch plan P111.

[205] SP48 and his team went again to the location on 14 September 2010, together with medical forensic officers, and conducted an examination of the burn site.

[206] SP48 testified that he saw the oil palm leaves overhanging the burn site had signs of scalding ('layu') due to the effect of burning. Photographs P4(72) and (73) were shown to SP48 and according to him those photographs showed the effect of heat from a nearby source on the palm leaves. His evidence on the scalding was challenged in cross-examination but remained intact.

[207] Photographs P3(98) and (99) were shown to SP48 during re-examination. These photographs indicated the presence near the suspected burn site of banana palms. SP48 said the leaves were banana shoots. On close examination, it can be seen that the trunks of the banana trees had been cut off at the top and new shoots had just begun to regrow. In our view, due to the time lapse between the date in the charges and the date the photographs were taken (about two weeks later) the presence of the banana shoots does not adversely affect the evidence of SP33 of having seen a huge fire at that site.

[208] Hussein bin Omar Khan (SP51) gave evidence that on 13 September 2010 around 7pm he was asked by SP32 to follow the latter to an oil palm estate at Jalan Sungai Arak. There SP51 found a dumpsite with pieces of wood. He took possession of 11 pieces of wood which were burnt or partially burnt. The location of the dump site and the pieces of wood found there can be seen from the photographs in P12. The discovery of the pieces of wood lends credence to SP33's evidence of logs having been delivered to the farm on 29 August 2010 and of the fire on the night of the day in question.

[209] SP48 also testified that during the site investigations at the farm they found, among others, a cricket bat (P118) in one of the rooms — room 3. The cricket bat was marked with the No '12' and later handed over to SP99, the investigating officer, who subsequently handed it, together with other exhibits, to the Chemistry Department for analysis.

[210] DSP Shaikh Zainal Abidin bin Shaikh Omar ('SP34') testified that on 14 September 2010 around 5.30pm he was directed to go to Kampung Kelanang. There, he saw marine divers in the river. The divers brought up six zinc sheets. They were handed to him and he marked them as H15–H20. The zinc sheets H15–H20 (P77A, P80A, P78A, P79A, P75A, and P76A respectively) were subsequently handed over to SP99 who sent them to the Chemistry Department for analysis.

[211] SP86 was the chemist who conducted DNA analysis of the cricket bat and zinc sheets as well as various other items.

[212] SP86's examination of the cricket bat (P118) showed the presence of bloodstains on the cricket bat. The DNA profile obtained from the blood stains matched that of Hisham.

[213] SP86 found bloodstains on zinc sheets H16 and H17. The DNA profile obtained from the bloodstains on zinc sheet H16 matched those of Kamal's biological mother and children. SP86 also found that the DNA profile of the bloodstains on zinc sheet H17 matched those of Kamil's biological mother and father.

[214] SP99 gave evidence that on 12 September 2010, he went with his team and SP32 to Kunci Air Jalan Pasar Besar Banting. The second and fourth accused persons were with SP32. There, SP99 saw the fourth accused pointing towards the direction of the Kunci Air. SP99 instructed three divers to enter the Kunci Air. The divers retrieved two Blackberry handphones, one white and one black, from the depths of the Kunci Air.

[215] A white Blackberry handphone bearing IMEI No 352060042164855 (P39(B)) was identified by SP14, Kamil's wife, as belonging to Kamil. SP14 had handed over the box for the Blackberry handphone, together with, among others, its warranty card, to the police.

[216] A black Blackberry handphone bearing IMEI No 3565430351388048 (P28A) was identified by SP8 ('Hisham's wife') as belonging to Hisham. Its box was handed over by SP8 to the police.

[217] SP51, a police forensic officer testified that on 13 September 2010 around 5.05pm he and his team went to Sungai Kanchong Laut. There, a Seiko Racing Team watch (P74) was discovered. Its metal strap and glass face were broken. According to SP97, the receipt of purchase of that Seiko watch bearing serial No 1335759 as well as the box, manuals and warranty cards were received from a member of Kamal's family.

[218] According to Hisham's wife, SP8, he was wearing a Longines watch when he drove her to her workplace in the morning of the day in question. SP8 identified the watch (P30) and the warranty card that she had handed over to the police earlier (P31).

[219] SP27 testified that on 11 September 2010 he went to Selvapandian a/l Veerappan ('SP12')'s house around 11pm. SP12 is the fourth accused's uncle. SP27 seized P30 from SP12's house. It was on a table in a bedroom in SP12's house. The serial number engraved on the back of the watch (34090536) was recorded in the search list signed by SP12 (P37) and in the police report lodged by SP27 in relation to the seizure (P112).

[220] SP12 admitted in evidence that he received a Longines watch from SP29. However, when P30 was shown to him in court he denied that it was the same watch given to him. He said the bracelet of the watch shown to him was different from the watch he received from SP29.

[221] In our view, SP8's and SP27's evidence as well as the contemporaneous documents (P37 and P112) were sufficient to show that Hisham's Longines watch had found its way through SP29 to SP12. SP12's denial of P30 being the same watch flew against the neutral evidence ie P37.

[222] On 14 September 2010 around 2.20pm, SP51 went to Sungai Kanchong Laut in Kampung Indah. He witnessed the discovery from the river by divers of a Bell & Rose Limited Edition watch. It too had a broken glass face. This watch was identified by SP14, Kamil's wife, as her husband's watch (P42A). The box and warranty card with a handwritten note in Kamil's handwriting on the purchase of P42A were handed over by SP14 to the police and tendered in evidence.

[223] Kamil's car, a black BMW with the registration No AAJ 5, was found on 6 September 2010 parked in the parking lot at Jalan SS 12/1B in Subang Jaya, across the road from the Dorsett Hotel. SP34, the head of the police forensic team, went to the scene where the car was found. He found the car to be locked. It was only unlocked half an hour later when a key was obtained from Kamil's elder brother. A copy of *The Sun* newspaper dated 30 August 2010 was found inside the car.

[224] Sosilawati's car, a black BMW with the registration number of WTL 11 was also found on the same night (6 September 2010). It was found parked at the parking lot of Flat Anggerik in USJ 1 in Subang Jaya. SP25 was the head of the police forensic team called to the scene where the car was found. SP25

found the car was not locked, and it was wet and dirty. SP25 also found several newspapers in the car, all of which were dated 30 August 2010 (the day in question).

[225] The key to the car WTL 11 (P47) was found by a diver on the night of 13 September 2010 in a drain at USJ 1, Persiaran Subang, Subang Jaya. The diver was part of the team led by SP32 to the scene upon information received from SP29. The key was subsequently handed over to SP99. SP99 testified that he successfully started the car using the key.

[226] Hisham's car, a black Proton Perdana bearing registration No JDN 1148, was seen by SP15 on the night of the day in question still parked at the location given by Hisham to SP15 in their telephone conversation earlier on that day. She went to the same location on 31 August 2010 and found the car still there. SP8 and a relative went to retrieve the car sometime in the middle of September 2010 from the same location.

Finding

[227] The irresistible inference that may be drawn from the huge fire seen by SP33 around midnight of the day in question, which scalded the oil palm fronds nearby as testified by SP48, was that someone went to great trouble to hide traces of any evidence of what had occurred on the night of the day in question and the fate that had befallen Sosilawati and the three others.

[228] The DNA from the bloodstains on the zinc sheets retrieved from the river and on the cricket bat found at the farm showed that Kamil, Hisham and Kamal had been inflicted with injuries. The screams heard by SP33 lend weight to this irresistible inference.

[229] The manner of the disposal of the zinc sheets, Kamal, Kamil and Hisham's watches, and Kamil and Hisham's telephones show that there was an attempt to obliterate any trace of the incident.

[230] There was further evidence of that attempt to sidetrack the police by parking Sosilawati's car at USJ 1 and Kamil's cars at SS 12. The key to Sosilawati's car was recovered from the drain.

COMMON INTENTION

Were Sosilawati and the three others murdered by the accused persons acting with common intention?

[231] The accused persons were charged under s 302 read together with s 34 of the Penal Code.

[232] This court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 dealt with s 34 of the Penal Code at p 649 as follows:

> [98] Section 34 of the Penal Code provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone. The Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344 observed that:
>
> > In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
> >
> > Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*The Supreme Court (of India) on Criminal Law 1950–1960* by JK Soonavala at pp 188–193).
>
> [99] It is trite that when s 34 of the Penal Code is alluded to in a charge for murder, there is no requirement to prove who actually or ultimately caused the death of the deceased (*Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688). In that case the court opined:
>
> > In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v Emperor* AIR 1925 PC 1, the court stated:
> >
> > > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[233] The following evidence shows that the first accused knew that Sosilawati and Kamil were coming to Banting on the day in question.

[234] Kamil had called the first accused at telephone No 0122051243 on 23 August 2010 and shortly after that he called Sosilawati. The same thing

happened on 24 August 2010. The call to the first accused's number was made after Kamil received a missed call from the first accused.

[235] The telecommunication records show that at 5:59:04pm and 6:01:25pm on the day in question Sosilawati made telephone calls to the first accused.

[236] Evidence also shows that Sosilawati had business dealings through her company, Southern Symphony Sdn Bhd, with the first accused acting as her solicitor. In fact, Sosilawati's dealings with the first accused went beyond that of solicitor-client relationship.

[237] Southern Symphony and the first accused's legal firm had also entered into a 'joint venture' agreement on 3 August 2010 (P161). In the 'joint venture' agreement, they would sell a piece of property purchased by Southern Symphony Sdn Bhd at an inflated price, and the gain from the sale be shared equally between them.

[238] That agreement was the basis for the issuance of the two cheques drawn on the private bank account of the first accused (P162 and P163). This is evident by the words 'Pursuant to Agreement between Pathma Nalli & Partners and Southern Symphony Sdn Bhd' written on the reverse side of the cheques. SP60, a clerk at the first accused's legal firm (Pathma Nalli & Partners) testified that she was the one who wrote out the cheques and wrote the words on the reverse side of the cheques on the first accused's instructions. These were the two cheques according to SP15 that Sosilawati wanted to bring forward the dates of encashment, the very reason why Sosilawati and the three others went to Banting on the day in question.

[239] The evidence points to the second, third and fourth accused persons being employees of the first accused. This is confirmed by SP33, SP37, SP39 and SP60. The fourth accused was in charge of the farm.

[240] SP33 gave evidence that on the day in question, before 5pm, she and the others were told by Jesyntha to stay indoors. She then prepared food for the fourth accused, who came back around 5pm. While the fourth accused was eating, he asked Jesyntha to get his shoes but Jesyntha asked SP33 to do so. The fourth accused then asked Jesyntha to get a *parang* and a knife. Jesyntha instructed SP33 to do so. SP33 took the *parang* and knife from the top of a cupboard in the fourth accused's room. He instructed her to place the *parang* and knife behind the door where there was a sofa.

[241] SP33 then saw the fourth accused going out of the house. That was when she saw the first accused arriving in his golden brown car. SP33 saw the

fourth accused place the *parang* and knife in the back seat of his own car which she described as the car without a roof ('kereta yang tak ada tutup'). After that, the first and fourth accused persons were seen by SP33 having a conversation near the dog kennels. They were then seen by SP33 leaving in a hurry in the fourth accused's car. SP33 estimated the time to be around 5.55pm.

[242] According to SP33, Jesyntha received a telephone call after they left. Lolitha who was staying in the front house (which was identified by SP33 as the house in P4(5)) was instructed to move into the building (described by SP33 as 'asrama') where SP33 stayed with the fourth accused and his family. She did so. They remained in the 'asrama' with windows closed, all night, except when SP33 went out to place the pail outside and to retrieve the pail later that night, as mentioned earlier.

[243] SP33 said that around 1am when she went to retrieve the pail from the karaoke hut, she saw the fourth accused (wearing the brown and blue t-shirt she had placed in the pail earlier) at the back part of the farm where the huge raging fire was. She saw him with three of his workers but she could not see their faces.

[244] The next morning, 31 August 2010, SP33 said she was directed by Jesyntha to go out of the house on the fourth accused's instruction. When she came out of the house she saw the first accused was already there with the fourth accused. The first accused gave her a document in a blue folder and the fourth accused told her to give it to Jesyntha for safe keeping. SP33 did as instructed. But later the fourth accused came back and asked for the document.

[245] From SP33's evidence it was clear that the first and fourth accused persons knew that there were people coming to the farm that evening on the day in question. It was also clear that the fourth accused, under whose charge the farm was, had played an active role in securing that the other persons living/staying at the farm were kept out of sight of what was taking place in the other buildings and at the burn site.

[246] The acts of the second and fourth accused persons leading SP32 to the location where the Seiko watch, the logs and the zinc sheets were found, and pointing to the location, are admissible as conduct under ss 8 and 27 of the EA. The conduct and information leading to the discovery show that the second and fourth accused persons knew of the various locations where the items had been disposed of. They would not have had such knowledge had they not participated in the acts leading to the deaths of Sosilawati and the three others.

[247] All these circumstances, when taken together irresistibly lead to one and only conclusion that the first, second and fourth accused persons committed the offences as charged and that they committed the same in concert pursuant to a pre-arranged plan.

FINDINGS

[248] Our findings in summary are as follows:

(a) there was opportunity for the first, second and fourth accused persons to commit the murder. The farm ie the scene of the crime is the property of the first accused. Before going to the farm Sosilawati had given notice to the first accused of her intention to meet up with him, which necessitated going to the farm. In short, when Sosilawati and the three others entered the farm, an opportunity was afforded to the three accused persons to successfully carry out the murders. In short there was easy passage for the three accused persons to commit the offence;

(b) there was preparation prior to the murders, eg logs were brought into the farm with the intention of lighting them up later. This preparatory act falls squarely under s 8 of the EA;

(c) there was ample evidence, as testified by SP33, of the logs having been burnt. She clearly saw the fire from the burning logs. The remnants of the burnt logs were later discovered after information was received;

(d) the totality of the evidence is that the bodies of Sosilawati and the three others were completely incinerated with the use of the logs;

(e) SP33 also saw the first accused at the farm prior to the murder;

(f) there was evidence of discovery pursuant to s 27 of the EA;

(g) amongst the items discovered were burnt logs, zinc sheets that were placed on the logs, watches, and Blackberry handphones owned by the deceased persons;

(h) two of the sheets of zinc had bloodstains carrying the DNA of Kamil and Kamal;

(i) the DNA of Hisham on the cricket bat, an item discovered in the course of the investigation, further strengthened the case against the three accused persons;

(j) P30 was discovered from SP12 who received it from SP29, who in turn was directed by the fourth accused to give it to SP12;

(k) there was violence in this case. Bloodstains of the deceased persons were found on the bat, two zinc sheets and wall of the farm house. Unless there was violence no blood would have been splattered on the wall;

(l) the existence of fear was established. SP33 testified that she heard screams during the night of the day in question;

(m) the first, second and fourth accused persons attempted to allay suspicion by covering their tracks subsequent to the murder. They did it in the following manner:

(i) at the risk of repeating, the three accused persons burnt the bodies in order to disassociate Sosilawati and the three others with the farm, and by extension with them;

(ii) physical items owned by the deceased persons were disposed of and scattered at various locations. Personal items belonging to the deceased persons like the Seiko watch, the Bell & Ross watch, and the Blackberry handphones were simply thrown away, except for Hisham's watch which was discovered from SP12. It goes against all logic for poor farm hands to dispose of these items, unless ordered by someone. Only a person who wields power over them could give such an order; and

(iii) the three accused persons also attempted to sidetrack the police by parking Sosilawati's car in USJ 1 in Subang Jaya in the hope that the police would be thrown off the trail. With the car found somewhere else, it would have appeared that surely Sosilawati could not have gone to Banting; and

(n) the conduct of the second and fourth accused persons, pointing to the location of the items that led to their discovery falls within the ambit of s 8 of the EA.

[249] At the end of the prosecution case, the combined weight of the evidence leads to only one conclusion ie Sosilawati and the three others must have met their untimely ends at the farm at the time stated in the charges, at the hands of the first, second and fourth accused persons. That being so, the prosecution had successfully established a prima facie case against the three accused persons.

[250] Alluding to the defence of the first accused as at para 34 of this judgment, it was mere denial and one of alibi. The second accused at para 38 of this judgment merely said that nothing happened at the farm on the day in question. The fourth accused in his defence merely testified that he saw Sosilawati and the three others being beaten up, but completely denied his involvement (as per paras 42–43 of this judgment). We conclude that the defence evidence failed to raise any reasonable doubt on the prosecution case.

DECISION

[251] From our careful examination of the evidence, the relevant portions of which we have set out at length above, it is our finding that there is overwhelming evidence before the court to show that Sosilawati and the three others were murdered at the farm within the time and on the date stated in the charges, and that their murders were committed by the first, second and fourth accused persons acting with common intention. As a corollary, we agree with the courts below that on the evidence before the courts the prosecution had succeeded in proving its case beyond reasonable doubt as against the first, second and fourth accused persons on all the four charges.

[252] However, we find that there is insufficient evidence implicating the third accused in the murder of Sosilawati and the three others as charged. The third accused was just a farm worker. The evidence connecting him to the incident are: (a) he was seen by SP33 unloading the logs at the farm a day before the day in question; and (b) he was seen by SP59 at the farm at 10pm on the day in question. However, we hold that it is unsafe to rely on the evidence of SP59 who was rightly declared hostile by the learned trial judge. Apart from that, there was no evidence of conduct under s 8 of the EA and no evidence showing that he was involved in the discovery of the items under s 27 of the EA. In view of the above, we hold that the learned trial judge had erred in calling upon the third accused to enter on his defence at the close of the case for the prosecution.

[253] In the result, we dismiss the appeals of the first, second and fourth accused persons and affirm the convictions and sentences imposed on them by the courts below. We find the convictions safe. For the reasons given above, we allow the appeal by the third accused. The conviction and sentence against the third accused are set aside. The third accused is acquitted and discharged of the offences as charged.

Matan's appeal allowed, his conviction and sentence set aside and acquitting and discharging him of the charges; the appeals of the other three appellants dismissed and their convictions and sentences affirmed.

Reported by Ashok Kumar